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THE

LAW OF TRADE MARKS:

INCLUDING

THE MERCHANDISE MARKS ACT, 1862,

AND

THE TRADE MARKS REGISTRATION ACT, 1875,

With the Rules thereunder,

AND

PRACTICAL DIRECTIONS FOR OBTAINING REGISTRATION;

WITH NOTES, FULL TABLE OF CASES, AND INDEX.

BY

J. BIGLAND WOOD, LL.B.,

OF THE INNER TEMPLE, ESQ., BARRISTER-AT-LAW, AND LATE SCHOLAR OF KING'S COLLEGE, CAMBRIDGE.

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PREFACE.

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Although the principles of trade mark law are well ascertained, there has been since the 22nd Eliz. (*a*), a large and increasing amount of litigation relating to trade marks, shewing the value which is set by the world of commerce upon the use of these symbols.

It may safely be asserted, that many cases of infringement would never have occurred at all, and many others not have been brought into Court, had there been any ready means of ascertaining the true proprietors of the various trade marks in use in the different branches of trade.

To provide these means appears to be the chief object of the short Registration Act, passed on the 15th of July, 1875, and the numerous rules thereunder published in January, 1876.

The Act of 1875 has not greatly affected the Merchandise Marks Act of 1862.

(*a*) See the case mentioned by Doderidge in Southern *v.* How, Popham, 143.

The above mentioned Acts and Rules represent the total result of legislative action on the general subject of trade marks.

The case law bearing upon trade marks is scattered over a large area of Reports.

The Act of 1875 has rendered it extremely advisable that the owners of valuable trade marks should apply for registration at least three months before the 1st of July, 1876.

These circumstances have led the author to believe, that a publication in the present form would meet an existing and pressing want. He has accordingly collected into one small volume the text of the above mentioned Acts and Rules, adding thereto such notes as appeared to be in point, and has prefixed by way of introduction first, such general view of the principles of the law of trade marks, established by the reported cases, as appeared suitable to enable the lay reader and legal student to appreciate the general bearing of the Acts and Rules, and, secondly, a few practical suggestions as to the selection of a trade mark, and directions as to the method of obtaining registration, which he hopes may be useful to those who may have occasion to avail themselves of the Act.

The writer has not forgotten that some readers may not have facilities for referring to the reported cases, and

has therefore quoted more at large, and generally written in a style less terse, than he would have attempted had he ventured to write exclusively for the use of the profession.

On reading the cases, the writer found many which appeared to have been reported merely to show the bearing of special circumstances upon the principles then already established by authority. Many of these cases are not cited in the following pages, but it occurred to the writer that his trouble in referring to the cases not cited, might not be altogether wasted, if he prepared such a list of all the trade mark cases to which he had referred, as might perhaps serve to refresh the memory of the practitioner as to the point or principle decided or mentioned in each case. This list will be found at page vii., and it will be seen that it is prepared in a somewhat novel form. Opposite the name of each case are placed in one column the references to the Reports in which the case appears, and in a separate column such short index of its contents as could be comprised in a few catchwords or a short sentence.

As trade mark cases are often known either by the article to which the mark was applied, or by the words forming a portion of the mark itself, the practitioner will, it is hoped, excuse the appearance of such unscientific

terms as "the Omnibus Case," "Mexican Balm," and others of a like nature among the catchwords.

In presenting this little work to the profession and general public, the writer craves their indulgence, on the ground of the short period which has elapsed since the Rules were made public, and the importance of proceeding to press at the earliest possible date.

5, Old Square, Lincoln's Inn.

March 11, 1876.

TABLE OF CASES.

NOTE.—This table contains a list of a large proportion of the cases specially bearing upon the subject of Trade Marks, showing the reports in which they are to be found and briefly indicating the nature of each case.

The reference to the pages in the following text will be found in column 3 after the catch word of the subject upon which each case is cited. The letters "t. m." are used as an abbreviation of "trade mark."

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Ainsworth *v.* Walmsley	L.R. 18, Eq. 518	T. m. in system of numbers and surname, 10. "Property," 12.
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Blofield *v.* Payne	4 B. & Ad. 410	Nominal damages, 2, 26.
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Braham *v.* Bustard	1 H. & M. 447 2 N.R. 572	"Excelsior" protected as if t. m., 10. Actual t. m. not infringed.

NAME OF CASE.	REPORTS.	INDEX.
Coates *v.* Holbrook	2 Sandford, Ch. R. 586	American case. Inferiority of goods. Knowledge of Purchaser. Aliens.
Cocks *v.* Chandler	L.R. 11 Eq. 446	Reading sauce. Acquiescence, 15. "Original," use of word, 17.
Colburn *v.* Simms	2 Hare, 543	Not a t. m. case. Common law as to delivery up of illegal copies of book, 31.
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Delondre *v.* Shaw	2 Sim. 237	Parties. Foreign copyright.

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Flavel *v.* Harrison	10 Hare, 467 22 L.J. Ch. N.S. 886	False allegation of patent, 8. Laches.
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Glenny *v.* Smith	2 Dr. & Sm. 476	Name of former employer improperly used, 10. Practice as to evidence, 19.
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Hine *v.* Last	10 Jur. 106	Intent presumed from closeness of imitation.
Hirst *v.* Denman	L.R. 14 Eq. 542 41 L.J. Ch. 752 27 L.T. 56	T.m. in name of unregistered pattern.
Hogg *v.* Kirby	8 Ves. 215	Publication by defendant of magazine as continuation of plaintiff's restrained.
Holloway *v.* Holloway	13 Beav. 209	Injunction affecting use of defendant's own name, fraud being proved.
Hookman *v.* Pottage	L.R. 8 Ch. 91	Improper reference to name of late firm, 10.
Hunt *v.* Maniere	34 Beav. 157	Goods in possession of wharfinger, his duty before injunction.

NAME OF CASE.	REPORTS.	INDEX.
Ingram *v.* Stiff	5 Jur.N.S. 947	London Journal *v.* Daily London Journal.
James *v.* James	L.R. 13 Eq. 421	Use of name of deceased discoverer of secret preparation, 4, 17.
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Kinahan *v.* Bolton	15 Ir. Ch. Rep. 75	"L.L." acquiescence. Protest. Account.
Knott *v.* Morgan	2 Keen, 213	Omnibus case. Neglect of plaintiff to comply with fiscal regulation.
Lawson *v.* Bank of London	18 C.B. 84	Actual user necessary, 6, 76. Note by editor on the cases.
Leather Cloth Co. *v.* American Leather Cloth Co.	11 H.L. Ca. 523 35 L.J. Ch. 53	"Patent" deception, 8, 9. Similarity, 18. Advertisement not t. m., 90. Assignment causing deception, 89.
Leather Cloth Co. *v.* Hirschfield	L.R. 1 Eq. 299	Damages, 27.
Leather Cloth Co. *v.* Lorsont	L.R. 9 Eq. 345	Not fully reported on t. m. point.
Lee *v.* Haley	L.R. 5 Ch. 155	The Guinea Coal Company, Injunction limited as to locality, 11. Laches, 33. Misconduct of plaintiff, 7.
Leman *v.* Houseley	L. R. 10 Q.B. 66	Not a t. m. case, *see* p. 74.

NAME OF CASE.	REPORTS.	INDEX.
Wright *v.* Tallis	1 C.B. 893	Deceit on part of plaintiff, copyright case.
Young *v.* Macrae	9 Jur. N.S. 322	Paraffine. Distinction between fancy and other names. Name acquired during patent.

CONTENTS OF THE INTRODUCTION.

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PART II.

THE INTRODUCTION

Is divided into two parts, the first being intended to furnish some general information on the Law of Trade Marks, which would have been out of place in the notes to the Acts themselves, but which appeared necessary to enable the lay reader and law student to appreciate the bearing of the Acts and Rules upon the subject. The second, commencing at page 35, contains practical directions as to obtaining registration, with a few suggestions on the selection of a Mark for the purpose of registration, which can be of use only to persons engaged in obtaining or contemplating registration.

Object and plan of introduction.

PART I.

Generally speaking, all the Queen's subjects, all persons residing in her dominions, and the subjects of all friendly states (*a*), carrying on lawful trading, have the right, if they will, to manufacture or sell goods, and to announce the fact to the public. None of such persons have

General principle.

(*a*) See for instance the cases in which the Collins Company of America were plaintiffs.

Representations and misrepresentations apart from all question of trade mark.

the right to vend goods, not being goods manufactured by or coming from the hands of any particular person, as manufactured by or coming from the hands of such particular person. If a trader induces the purchaser of goods to buy them, by affirming contrary to the fact that another trader has had anything to do with them, he cheats two persons, the purchaser and the rival trader; and each of them may sue him in the Civil Courts, and anybody may prosecute him in the name of the Queen by criminal proceedings for a cheat, or for obtaining money under false pretences. In cases where, on a sale of goods in this manner, the trader sells goods inferior to those which he represents them to be, he thereby damages the person whose goods he represents them to be, in two ways; first, he has sold what the rival trader, or those buying from him, would otherwise have sold; secondly, he has passed off an inferior article as being his rival's production, whereby his rival's reputation will be prejudiced, and in either case the rival trader may suffer in pocket. But it is not necessary in an action for damages, founded on such misrepresentations, that the rival should prove the inferiority in the goods sold, or any specific damage, to entitle himself to some damages (*a*).

Instances might be given of injunctions issued on the ground of the specific misrepresentation that an article sold by one is the article of the

(*a*) *Blofield* v. *Paine*, 4 B. & Ad. 410.

other—where no question of trade mark would arise. Thus in *Seeley* v. *Fisher* (*a*), although an injunction was refused upon the facts, it was held that where there are two rival works, the Court will restrain the proprietor of one from advertising it in terms calculated to induce the public to believe that it is the other work, but will not restrain him from publishing an advertisement tending to disparage that other work; a mere libel or disparagement of property not giving a right to an injunction (*b*).

General proposition.

Every man therefore has a right to prevent goods other than his being sold as his by another person.

In this proposition, and generally in trade mark cases, the word "his" and expressions tantamount thereto are used for the sake of convenience, not with the meaning of present ownership, but to denote some connection of the person whose the goods are said to be, with the goods.

If Jones is or has been engaged in manufacturing, selling, inspecting, or doing anything in connection with goods, Smith must not sell goods with which Jones has had nothing to do, and in selling them affirm them to be goods with which Jones has had something to do, either by using the expression "Jones's goods" or by any other means of representation.

(*a* 11 Sim. 581; 10 L. J. Ch. 275.

(*b*) *Prudential Assurance Co.* v. *Knott*, L. R. 10 Ch. 142.

Thus for instance, if Jones manufactures iron, Smith in selling iron which Jones has not manufactured may, with reference to the quality of the iron sold, say that it is as good as, or better than Jones's, but he must not say "this is Jones's quality," even if the qualities are scientifically identical, lest the public draw the not unreasonable deduction that iron which is of Jones's quality is Jones's iron, so long as there is any danger of the public drawing such a deduction. It may be, if Jones had manufactured iron of a particular kind in a particular way, and Jones is well-known to have died long since, that in using the expression Jones's quality, Smith does not mean, and no one would take him to mean, that Jones or his successors in business had had anything to do with the particular iron sold,—in which case he might use the expression "Jones's quality" lawfully (*a*), but in this and similar instances Smith would not be making such misrepresentation as we have seen to be unlawful.

Representations may be made by express or circumstantial affirmation.

The representations which may, and the misrepresentations which may not be made, as to the relation of specific goods to specific traders or manufacturers, are, it is evident, capable of being made, either by express verbal or written affirmation, or impliedly by what may be called circumstantial affirmation.

(*a*) *James* v. *James*, L. R. 13 Eq. 421.

If a notice is put in the window of a public house that only Bass's ale is sold there, or if a customer asks for Bass's ale, or seeing a bottle of ale with Bass's label upon it, says he will buy that bottle; in all these cases it is as much affirmed to him that the liquor he obtains is Bass's ale, as if the landlord told him so in so many words, or gave him a written statement of the fact.

Instances of circumstantial affirmation.

The representation which every man may make to the public, as to his connection with his goods, may be made in any form which does not interfere with the rights of others, either in making the like representations as to their own goods or otherwise.

How representations may be lawfully made.

Hence, any man may select a mark to be applied to his goods as a means of making representations to the public, and will be protected in the use of this mark so long as he does not select as his mark one which is calculated to interfere with the rights of others.

By marks, brands, &c., if properly chosen.

Conditions of proper choice.

It will be agreed on a little consideration, that to use any mark which is already in use in the same trade either generally or by particular persons, is the chief instance in which the protected use of the selected mark would be calculated to interfere with the rights of others. In other words, the mark selected must be capable of being used exclusively by the person adopting it.

Mark selected must not be already in use.

Altering the phrase once more, and taking the

Exclusive user in public required.

preliminary proposition for granted, the right to use a mark, for the purpose of making representations as to the relation of the person adopting the mark to the goods to which it is applied, must be acquired by exclusive public user (*a*), though the period of exclusive user need not be for any great length of time (*b*).

Theoretical objection.

As to the objection that by allowing one person to select, and be protected in his selection, of a particular trade mark on his goods, the rights of others must be *pro tanto* interfered with—it is a theoretical objection which attaches to all private rights (*c*); but it may be remarked (1) that the use of the mark, as a mark, cannot be intrinsically valuable, and that if A. uses the symbol of a bear on guns made by him, when this symbol is not otherwise in use in the trade, and B. another gun-maker subsequently objects to A.'s so doing, and in protest begins to mark his own guns with a bear mark, it would appear more than probable that his object was not so much the assertion of an abstract right as the perpetration of a concrete wrong—the stealing of the benefit of A.'s reputation as a gun-maker; (2) that the danger of interfering with the right of others has been so

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(*a*) *Lawson* v. *Bank of London*, 18 C. B. 84; *Maxwell* v. *Hogg*, L. R. 2 Ch. 307. As to the effect of the Act of 1875 upon this doctrine see sec. 2.

(*b*) *M'Andrew* v. *Bassett*, 33 L. J. Ch. 561, 4 N. R. 12, 123.

(*c*) See Mill's Essay on Liberty.

far recognized that the right to a trade mark cannot be claimed, where the intention of user only, and not the fact of user, has existed (*a*), the law insisting upon actual exclusive user in public.

Alteration introduced by Act of 1875.

The Act of 1875 may at first sight appear to have introduced an alteration in the law requiring exclusive public user, by making registration equivalent to public user (*b*); and although it may be suggested that registration may be considered as being public user, it must be confessed that the theoretical symmetry of trade mark law is in the Act somewhat sacrificed to the claims of practical convenience.

Remaining conditions of proper choice.

Ex turpi causâ non oritur actio.

Fraudulent trade.

Falsehood in trade mark itself.

The remaining cases in which the selected mark would not be protected, because calculated to interfere with the rights of others, are those in which the maxim *ex turpi causâ non oritur actio* applies; as would be the case where the mark was used in a fraudulent trade (*c*), or where the mark itself contained a misrepresentation calculated to deceive the public,—the fact of the claimant of the mark having been guilty of collateral fraud not being a ground for enabling another person to commit a further fraud with impunity (*d*).

(*a*) *Maxwell* v. *Hogg*, L. R. 2 Ch. 307.

(*b*) See Act of 1875, sec. 2.

(*c*) See remarks in *Lee* v. *Haley*, L. R. 5 Ch. 155.

(*d*) *Ford* v. *Foster*, L. R. 7 Ch. 611, where the older cases are cited and explained.

Use of word Patent in trade mark.

An instance of misrepresentation in the mark itself which has frequently come before the Court, is the use of the word Patent, in the trade mark, in a sense which was untrue (*a*).

Deception caused thereby.

The deception which arises in these cases was thus expressed by Wood, V.-C., in refusing an injunction in *Morgan* v. *McAdam* (*b*).

> "All those who are induced to buy these crucibles thus described as 'Patent Plumbago Crucibles,' are to a certain extent deceived, because they are led to believe that the article is protected by a patent, and they may be induced to purchase it from the plaintiffs, under the belief that there is a patent, and that the plaintiffs, or at least some limited number of persons, are the only persons authorized to sell it, and further they are led to believe that, if they should be minded to set up any manufactory of the same kind for themselves, they would be unable to do so, in consequence of the plaintiffs being the possessors, either by way of license or ownership, of a patent preventing the world at large from imitating the article which is sold by them under this particular designation."

(*a*) *Flavel* v. *Harrison*, 10 Hare 467, 22 L. J. Ch. (N.S.), 886 ; *Morgan* v. *McAdam*, 36 L. J. Ch. 228. See also *Leather Cloth Co.* v. *American Leather Cloth Co.*, 11 H. L. Ca. 523, 35 L. J. Ch. 53, and *Ford* v. *Foster*, *ubi suprd.*

(*b*) 36 L. J. Ch. 228.

Case of patent having expired.

How far the owner of goods, which, during the existence of a patent, have become known by a trade name or mark containing the word patent, can continue to use the old name or mark, does not appear to be quite decided (*a*).

Of course it would be better, and those who are inclined to act with proper honesty would take care, to put the date of their patent upon the articles which they designate as patented; but when this has not been done, it is submitted that a plaintiff who could adduce strong proof that the word patent had become a mere descriptive name or mark of quality, and no longer made to the public the deceptive representations above-mentioned, would not be deprived of his remedy against an infringer because of the word patent in the plaintiff's trade mark (*b*).

Essential particulars of trade mark not important before the passing of the Act of 1875.

Prior to the passing of the Act of 1875, in cases not connected with the Act of 1862, but founded on circumstantial misrepresentation, the question whether the misrepresentation was made by means of a trade mark or by some other form of circumstantial affirmation, which involves the question of what the essential particulars of a trade mark are, was not of so great importance as

(*a*) See *Edelsten* v. *Vick*, 11 Hare 78; Lord Kingsdown's remarks on that case in the Leather Cloth Co.'s case *ubi suprd*, and *Morgan* v. *McAdam*, *ubi suprd*.

(*b*) *Marshall* v. *Ross*, L. R. 8 Eq. 651. See the somewhat analogous reasons quoted at page 16 as to the test of a trade name or mark having become *publici juris*.

it is likely to become in future. (See Act of 1875, Section 1.)

Instances of injunctions.

Hitherto the use of that which served the purpose of making unlawful representations, whether it was a surname of a living (*a*) or of a deceased trader (*b*), a fancy name as Eureka (*c*), initials (*d*), a particular kind of tallies applied to bundles of iron wire (*e*), an adjective, as Excelsior (*f*), the name of a country as Anatolia (*g*), of a place as Glenfield (*h*), or Leopoldshall (*i*), the name of a former employer so written over a shop as to make it look like his (*k*), the name of a former partnership firm employed in the same way (*l*), skilful and correct references to a rival trader, and certificates in his favour in order to introduce his name in connection with the goods (*m*), a combination of common colours, inscriptions, route, and livery of driver and conductor in an omnibus case (*n*), a name in a particular locality, as

(*a*) *Ainsworth* v. *Walmsley*, L. R. 1 Eq. 518.
(*b*) *Dent* v. *Turpin*, 2 J. & H. 139, 30 L. J. Ch. 495.
(*c*) *Ford* v. *Foster*, L. R. 7 Ch. 611.
(*d*) *Hall* v. *Barrows*, 4 De G. J. & S. 150.
(*e*) *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185.
(*f*) *Braham* v. *Bustard*, 1 H. & M. 447.
(*g*) *M'Andrew* v. *Bassett*, 33 L. J. Ch. 561.
(*h*) *Wotherspoon* v. *Currie*, L. R. 5 H. L. 508, 42 L. J., Ch. 130.
(*i*) *Radde* v. *Norman*, L. R. 14 Eq. 348.
(*k*) *Glenny* v. *Smith*, 2 Dr. & Sm. 476.
(*l*) *Hookham* v. *Pottage*, L. R. 8 Ch. 91.
(*m*) *Franks* v. *Weaver*, 10 Beav. 297.
(*n*) *Knott* v. *Morgan*, 2 Keen 213.

"The Pall Mall Guinea Coal Company" in Pall Mall (*a*), a fancy name in lawful use by traders *inter se* (*b*), or surnames, being the name of the defendant and a person whose permission he had obtained, and not the name of the plaintiff, but used so as to be a fraud upon the plaintiff (*c*), has been equally and within proper limits (*d*) restrained, on a fit case for protection being made out, without any nice distinctions being raised as to the essential particulars of a trade mark, because the same principle was applied in all cases, whether trade mark cases or not.

Trade mark law does not depend on law as to representations alone.

Although, however, trade mark law is greatly concerned with the consideration of what representations in respect of goods are lawful and what unlawful, it does not depend solely thereon; for the Court of Chancery in an early case (*e*) decided, that, if the defendant had used the plaintiff's trade mark ignorantly, under such circumstances that if he had used it knowingly he would have been liable at common law in an action for deceit and misrepresentation, the Court would, notwithstanding his innocence, restrain the infringer; thus recognizing the right to the exclusive use of a trade mark as a species of property. Whether and if so in what sense the word property could be properly applied to the right thus recognized, has

Ignorance of infringer no excuse.

(*a*) *Lee* v. *Haley*, L. R. 5 Ch. 155.
(*b*) *Ford* v. *Foster*, L. R. 7 Ch. 611.
(*c*) *Croft* v. *Day*, 7 Beav. 84.
(*d*) See *post*, page 23.
(*e*) *Millington* v. *Fox*, 3 My. & Cr. 338.

In what sense the right to use trade mark is "property."

been a question upon which different judges have expressed themselves differently. In a recent case (*a*) Wood, V.-C., put the matter as follows :—

"This Court has taken upon itself to protect a man in the use of a certain trade mark as applied to a particular description of article. He has no property in that mark *per se*, any more than in any other fanciful denomination he may assume for his own private use otherwise than with reference to his trade. If he does not carry on a trade in iron, but carries on a trade in linen, and stamps a lion on his linen, another person may stamp a lion on iron ; but when he has appropriated a mark to a particular species of goods, and caused his goods to circulate with this mark upon them, the Court has said that no one shall be at liberty to defraud that man by using that mark, and passing off goods of his manufacture as being the goods of the owner of that mark. And inasmuch as the Court protects the owner of the mark, he is entitled to authorize another, when he hands over his business to him, to place that mark on his goods. That is a right which, being protected by this Court, may be disposed of for value, may be bought and sold, and is therefore, in that sense of the word, 'property.'"

(*a*) *Ainsworth* v. *Walmsley*, L. R. 1 Eq. 518.

Explanation of Millington v. Fox.

The following remarks of Wood, V.-C., on the case of *Millington* v. *Fox* (*a*), explain the bearing of that case very clearly :—

> "I never could understand why the case of *Millington* v. *Fox* introduced any difficulty. The principle of *Millington* v. *Fox* is this, that although a person has used another man's trade mark perfectly innocently, if he continues for one moment after he has been told of it to use another man's trade mark, he does so fraudulently, and, if he seeks to keep in his pocket profits which he has made by representing, however innocently, that his goods are another person's, after he has been told of the fact, it is fraud" (*b*).

How the right to a trade mark may be dealt with.

Property in a trade mark being acquired can be dealt with only to a limited extent in connection with the goodwill, or some part of the goodwill of the business in which it is acquired.

Connection with goodwill of business.

Indeed, it would appear to form part of the goodwill of the business (*c*), if the second section of the Act of 1875 did not appear to suggest a distinction between the two.

(*a*) 3 My. & Cr. 338.

(*b*) *M'Andrew* v. *Bassett*, 33 L. J. Ch. 561, 10 L. T. (N. S.) 445.

(*c*) *Bury* v. *Bedford*, 4 De G. J. & S. 352, 10 Jur. N. S. 503 ; *Hall* v. *Barrows*, 4 De G. J. & S. 150, 33 L. J. Ch. 204, 10 Jur. N. S. 55 ; *Churton* v. *Douglas*, 1 Johns. 174, 28 L. J. Ch. 841.

An asset of partnership.

A trade mark forms part of the assets of a partnership, and if upon forming a partnership nothing is said as to the right which one partner has to use a particular mark, he will be held to have contributed it to the common stock (*a*).

Conditions of valid assignment.

Although the right to a trade mark may be assigned or transmitted in connection with the goodwill of the business to which it applies, it must be remembered that the use of the mark cannot be protected in the new owner, if the change of ownership has caused the mark to become calculated to deceive the public. Thus, if an engraver, whose profits and reputation depended upon the personal skill he applied to his work, were to assign the goodwill of his business to another engraver, that engraver could no more be protected in the use, upon engravings of his own, of a mark which had by the retiring engraver been exclusively used upon engravings executed by him, than in the use of a written statement that the engravings of the one are the engravings of the other artist.

Change in meaning of trade names and symbols from lapse of time.

Upon this point however, it must be remembered that names, and initials, and symbols, used in the first instance to denote the relation of goods to specific persons, may in the course of time become mere trade marks denoting quality, and assignable under the same conditions as other trade marks.

(*a*) *Bury* v. *Bedford, ubi suprà.*

In such cases the use of the names or initials does not, and is not calculated to, deceive the public, who, if they take the name for anything more than a sign of the quality of the goods, consider that the makers or vendors are thereby represented as the successors in business of the original maker or vendor.

Several owners.

When the right to a trade mark is assigned *inter vivos* or transmitted on death, it may come to belong to several persons having separate rights, each of whom must recognize the other's right, but can enforce his own exclusive right against the rest of the world, without making the other several owners parties to his suit.

Thus, in *Dent* v. *Turpin* (*a*), the original watchmaker of that name, having carried on business in more places than one, bequeathed his several businesses to distinct persons, each of whom brought a separate suit against a wilful infringer of their common trade mark, "Dent, London," and on a demurrer for want of parties it was held that there was not such a common interest in the wrong done that the plaintiffs must necessarily join in one suit.

Right lost by abandonment or acquiescence. As to cases where injunction obtained.

It appears that the right to a trade mark may be lost by abandonment or acquiescence (*b*), but where an injunction has been obtained against particular persons, it will be enforced at any sub-

(*a*) 2 J. & H. 139; 30 L. J. Ch. 495.

(*b*) *Cocks* v. *Chandler*, L. R. 11 Eq. 446.

sequent time unless such acquiescence on the plaintiff's part is made out as amounts to a license to use the mark (*a*).

Test of abandonment to public use; liability to deceive. Publici juris.

The test by which a decision is to be arrived at whether a word which was originally a trade mark has been abandoned to public use, and become, as it is commonly called, *publici juris*, is whether the use of it by other persons is still calculated to deceive the public; whether it may still have the effect of inducing the public to buy goods not made by the original owner of the trade mark, as if they were his goods. If the mark has come to be so public and in such universal use that nobody can be deceived by the use of it, and can be induced from the use of it to believe that he is buying the goods of the original trader, then, however hard it to some extent may appear on the trader, yet practically, as the right to a trade mark is simply a right to prevent the trader from being cheated by other person's goods being sold as his goods, through the fraudulent use of the trade mark, the right to the trade mark must be gone (*b*). With reference, however, to this test and questions of abandonment generally, it will be found that the Act of 1875, sec. 3, introduces important alterations in the case of registered trade marks, but the

Effect of Act of 1875 on the point.

(*a*) *Rodgers* v. *Nowill*, 3 De G. M. & G. 614.
(*b*) *Ford* v. *Foster*, L. R. 7 Ch. 611, at p. 628.

question of abandonment is still likely to arise where registration is opposed, or the rectification of the Register is sought.

Use of the word original.

Although the right to a trade mark may be lost by abandonment or acquiescence, yet the original inventor of a new manufacture and those claiming under him are alone—apart from all question of trade mark—entitled to designate such manufacture as "the original," and, if he or they have been in the habit of so designating their manufacture, an injunction will be granted to restrain another manufacturer from applying the designation to his goods (*a*).

Infringement.

A trade mark is said to be infringed, when it or an imitation of it is so applied to goods other than those of the owner of the mark as to deceive the immediate purchasers of the goods, or those to whom the goods are ultimately sold, into the belief that they are buying the goods of the owner of the trade mark. Thus it is an infringement, not only when a mark is fraudulently applied and sold to those who are ignorant of the deception, but also when a manufacturer applies a mark which he thinks is a mere brand of quality, and which neither he nor his immediate customers know to be a trade mark belonging to anybody at all (*b*); or when an innocent manufacturer

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(*a*) *Cocks* v. *Chandler*, L. R. 11 Eq. 446. See also *James* v. *James*, L. R. 13 Eq. 421.

(*b*) *Millington* v. *Fox*, 3 M. & Cr. 338.

applies a mark at the request of an innocent or fraudulent retail dealer (*a*), or when both manufacturer and retail dealer concur in the fraud (*b*); in any case, if the goods are or are likely to be actually passed off to the public as the goods of the true owner of the mark, the infringement has taken place.

Proof of infringement.

Where exact copy of mark used.

Where an exact copy of the plaintiff's mark has been applied by the defendant to goods of a class to which the plaintiff establishes his exclusive right to apply his trade mark, the infringement will generally be made out by proof of these facts.

Where colourable imitation.

Similarity.

In cases where a similar, and not the identical mark is adopted, that is to say, where there has been what is called a colourable imitation of the plaintiff's mark, the infringement will be proved by shewing actual cases of deception of persons of ordinary caution, acquainted with the plaintiff's mark, or such similarity in the similar mark as is under the circumstances calculated to deceive a person of ordinary caution, acquainted with the plaintiff's mark (*c*). Proof of an actual fraudulent intent to deceive on the part of the person using the similar mark, will have great

(*a*) In these cases the manufacturer, if exposed to legal proceedings, has a remedy over against the retail dealer. *Dixon* v. *Fawcus*, 3 E. & E. 537, 30 L. J. Q. B. 137, 8 Jur. N. S. 896.

(*b*) *Sykes* v. *Sykes*, 3 B. & C. 541.

(*c*) *Leather Cloth Co.* v. *American Leather Cloth Co.*, 11 H. L. Ca. 523, 35 L. J. Ch. 53.

weight on this point (*a*), but, where such intent is not proved, proof of actual deception will be expected from the plaintiff, who will not find the Court ready to discover sufficient similarity in the marks to entitle him to an injunction (*b*).

When the question of similarity arises, the Court will judge by actual comparison in court, and witnesses have also been allowed to state their opinion as to the chance of the mark deceiving the public (*c*).

Similarity.

In considering questions of similarity, it should be remembered that two marks may be very similar without being calculated to lead the public to mistake one for the other. Thus, where Crosse and Blackwell, and Crabb and Co., each used very similar labels on their Piccalilli pickle bottles, the former were refused an injunction against the latter, because as each party had their own name printed in large letters on their own labels—the two labels differed in the very point at which customers would be sure to look (*d*).

Objects of infringer may be twofold.

It must, however, be remembered thst the object of the infringer of a trade mark may be and generally is twofold. This was explained by Lord Langdale (*e*) in the following words:—

"It is perfectly manifest that two things are

(*a*) See the cases cited in *Cope* v. *Evans*, L. R. 18 Eq. 138, 30 L. T. 292.

(*b*) *Cope* v. *Evans*, *ubi supra*.

(*c*) *e.g. Glenny* v. *Smith*, 2 Dr. & Sm. 476.

(*d*) *Blackwell* v. *Crabb*, 36 L. J. Ch. 504.

(*e*) *Croft* v. *Day*, 7 Beav. 84, at p. 88.

> required for the accomplishment of a fraud such as is here contemplated. First, there must be such a general resemblance of the forms, words, symbols, and accompaniments, as to mislead the public. And secondly, a sufficient distinctive individuality must be preserved, so as to procure for the person himself the benefit of that deception which the general resemblance is calculated to produce. To have a copy of the thing would not do, for, though it might mislead the public in one respect, it would lead them back to the place where they were to get the genuine article, an imitation of which is improperly sought to be sold. For the accomplishment of such a fraud it is necessary, in the first instance, to mislead the public, and in the next place, to secure a benefit to the party practising the deception by preserving his own individuality."

The fact, therefore, that the alleged infringer's name and address appear upon the goods with reference to which complaint is made, will not have weight in the defendant's favour in considering the question whether infringement has been made out; but it may, it is suggested, have considerable weight on the question of damages, when the plaintiff alleges that his trade reputation has suffered from the inferiority of the spurious goods brought into the market by the defendant.

It is not necessary that the similarity should

be so great as to deceive when the two marks are placed side by side for comparison (*a*).

Cases where relief granted although no similarity.

There is one class of cases where the same relief will be given as if the mark had been copied, although there may be no similarity between the true mark and that adopted by the infringers, namely, where from the use of a particular mark, an article of trade has become known under a particular name. Here the right of the person using the mark extends both to the use of the mark and the use of the distinctive appellation resulting therefrom (*b*), and, therefore, if another person adopt a mark not similar to the mark of the person entitled to have the distinctive appellation applied to his goods, but still such as will cause the goods to which the dissimilar mark is applied to bear the same distinctive appellation in the market, the use of such dissimilar mark will be restrained (*c*).

Similarity of trade name resulting from dissimilar mark.

Where alleged infringer bears the same name appearing in trade mark.

Where the alleged infringer bears the same name as appears in the trade mark, or name alleged to have been infringed, it is often difficult to decide whether there has been any infringement.

(*a*) *Seixo* v. *Provezende*, L. R. 1 Ch. 192.

(*b*) See remarks of L. C. in *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185, at p. 201.

(*c*) *Seixo* v. *Provezende*, L. R. 1 Ch. 192. See remarks on this case in *Cope* v. *Evans*, L. R. 18 Eq. 138.

For, as Lord Justice Knight Bruce said in a celebrated judgment (*a*), where the right to sell an Essence of Anchovies under the name of Burgess was in dispute:—

> "All the Queen's subjects have a right, if they will, to manufacture and sell pickles and sauces, and not the less that their fathers have done so before them. All the Queen's subjects have a right to sell these articles in their own names, and not the less that they bear the same name as their fathers."

And Lord Justice Turner in the same case said:—

> "Where a person is selling goods under a particular name, and another person not having that name is using it, it may be presumed that he so uses it to represent the goods sold by himself as the goods of the person whose name he uses; but where the defendant sells goods under his own name and it happens that the plaintiff has the same name, it does not follow that the defendant is selling his goods as the goods of the plaintiff. It is a question of evidence in each case whether there is a false representation or not" (*b*).

But where a case of fraud is made out, the Court will not hesitate to grant an injunction,

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(*a*) *Burgess* v. *Burgess*, 3 De G. M. & G. 896.

(*b*) This point was also considered in *Rodgers* v. *Nowill*, 6 Hare, 325.

even where the defendants are in ordinary cases entitled to use the name by which the deception has been carried out, and the plaintiffs are not. Thus, in *Croft* v. *Day* (*a*), the plaintiff Croft claimed the exclusive right to use the style of Day and Martin in a particular business and way, and the defendant, whose name was Day, had obtained from one Martin the right to use his name, yet the Court did not hesitate to interfere sufficiently to protect Croft.

Caution exercised by the Court in granting injunctions.

In all cases, and even where fraud is established, the Court will be very careful not to act in any way which will operate to restrict a person in the proper use which he may make of his own name. Thus in *Churton* v. *Douglas* (*b*), the defendant, John Douglas, had assigned to the plaintiffs, two of his partners, his share in a business which the defendant, the plaintiffs, and another person, had carried on under the style of "John Douglas and Co."; the defendant afterwards got some other persons to join him in a partnership in the same class of business and locality, which it was proposed to carry on under the style of "John Douglas and Co.," under circumstances which shewed his intention of depriving the plaintiffs of the benefit of the assignment of his interest in the old firm, which he had made to them. It was held that all that

(*a*) 7 Beav. 84.
(*b*) 1 Johns. 174, 28 L. J. Ch. 841.

was wanted was a fair representation on the defendant's part that he was carrying on a totally different business, and although provision was made, in the injunction which was granted, that the defendant should not trade under the style of John Douglas *and Co.*, the injunction was carefully framed not to prevent him using his name of John Douglas if he could contrive to do so without holding out to the public that he was carrying on the old business.

The same caution is applied in all cases. Thus, where it was decided that the plaintiff was entitled to the exclusive use of a trade name, only so far as the public was concerned, the injunction was carefully framed to prevent its operating to hamper the use of the name in trade circulars, and generally amongst traders *inter se* (*a*).

Remedies by criminal proceedings.

The remedies to which an owner of a trade mark is entitled, on infringement of his mark being made out, are various. He may, in cases of fraud, resort to criminal proceedings, either founded upon the Act of 1862, or upon the law as to cheating and obtaining money under false pretences.

Civil remedies under the Act of 1862.

He may also resort to the civil remedies given him by the Act of 1862.

(*a*) *Ford* v. *Foster*, L. R. 7 Ch. 611. See the instances of injunctions given at p. 10, *ante*.

The reader is referred on these points to the Act itself and the notes thereon.

Civil remedies apart from Act of 1862.

The 34th section of the Judicature Act of 1873 enacts, that there shall be assigned to the Chancery Division of the High Court all causes and matters for the purposes there mentioned, which include the taking of partnership or other accounts. In cases where this enactment applies, the plaintiff in trade mark cases should assign his action to the Chancery Division; but in other cases, it would appear that he may select which division he pleases, and that in every case so far as jurisdiction is concerned, he may obtain the relief formerly appropriate either to common law or equity Courts, or, when not inconsistent, to both.

To which division of the High Court the action should be assigned.

If this is borne in mind, it will probably be the safer plan to consider what remedies a plaintiff could, previously to Nov. 1, 1875, have obtained, rather than to attempt to forecast the manner in which these remedies will be amalgamated in future cases.

Civil remedies prior to Nov. 1st, 1875.

At common law.

Previously to Nov. 1, 1875, the common law remedy, appropriate in trade mark cases apart from the Act of 1862, was damages in respect of past infringements, an injunction being also obtainable under the Common Law Procedure Acts. Substantial damages were usually obtained where the plaintiff was shewn to have been prevented from selling, by the defendant's having sold instead of him, and also where the plaintiff's

Damages.

Substantial.

reputation was shewn to have suffered, by reason of the defendant's passing off, as the plaintiff's, goods inferior to the plaintiffs (*a*).

Nominal.

If however, the plaintiff did not allege and prove any specific damage, it was considered that the action was brought to try the right, and if the right was established the plaintiff recovered nominal damages (*b*).

Proof of fraud necessary at common law.

An action would not lie at common law against what has been called an innocent infringer, as it was necessary to prove fraud (*c*).

Remedies in Equity. Injunction.

The chief remedy formerly appropriate to the equity courts took the form of an injunction to restrain the defendant from continuing to do that which if done after notice would have rendered him liable to an action at law.

quitable relief in aid of the legal right.

The equitable relief by injunction was said to be in aid of the legal right, and therefore in many cases, prior to the passing of Sir John Rolt's Act, 25 & 26 Vic. c. 42, the Court before assisting the plaintiff put him to the establishment of his right at law, by means of an action against the defendant (*d*).

(*a*) As to the assessment of damages see *post*, page 27.

(*b*) *Blofield* v. *Payne*, 4 B. & Ad. 410; *Rodgers* v. *Nowill*, 5 C. B. 109.

(*c*) *Crawshay* v. *Thompson*, 4 Man. & G. 357; 5 Scott, N. R. 562; 11 L. J. C. P. (N. S.) 301; *Dixon* v. *Fawcus*, 3 E. & E. 537; 30 L. J. Q. B. 137; 8 Jur. (N. S.) 896.

(*d*) For further information on this point see *Ford* v. *Foster*, L. R. 7 Ch. 611; and compare the remarks on *Millington* v. *Fox*, quoted at page 13 *ante*.

As to the form of injunction in trade mark cases; see Seton on Decrees, and the remarks on page 23, *ante*. Form of injunction.

Under Lord Cairns's Act 21 & 22 Vic. c. 27, in all cases where the Court of Chancery had jurisdiction to entertain an application for an injunction against the commission or continuance of any wrongful act, it was lawful for the Court, if it thought fit, to award damages to the party injured, either in addition to, or in substitution for, such injunction. Equitable jurisdiction as to damages.

For the procedure under this section, and the consolidated orders relating thereto, see Morgan's Chancery Acts and Orders, and Daniel's Chancery Practice. Former procedure.

The principles upon which both at law and in equity, damages were assessed in respect of infringements of trade marks appear to have been the same—except that, as the question of right was always tried in Chancery apart from the assessment, no case for merely nominal damages could be made out in Chancery. Principles of assessment, of damages at law and equity the same. Exception.

Where substantial damages were pressed for, the onus of proving special damage lay upon the plaintiff (*a*).

It was contended in the case of *The Leather-Cloth Co.* v. *Hirschfield* (*b*) in respect of one head of damage that the measure of damage would be the profit which the plaintiffs would

(*a*) *Leather-Cloth Co.* v. *Hirschfield*, L. R. 1 Eq. 299.
(*b*) L. R. 1 Eq. 299.

have made, if they had sold the same quantity of their goods as the defendant had of his goods marked with the imitation of their mark. This contention was however over-ruled, for it did not of course follow that the buyers of the low priced goods, which the plaintiffs alleged to be inferior to theirs, would have bought the plaintiffs' higher priced goods; or that, if they had wanted goods marked with the plaintiffs' mark, they would have purchased directly from the plaintiffs instead of going to some of the licensees or customers of the plaintiffs.

Distinction between patent and trade mark cases as to damages

In illustration of this point the distinction between trade marks and patent cases on the question of damages, as stated in a recent case (*a*), may be quoted. It was put thus—

> "In the former case the article sold is open to the whole world to manufacture, and the only right the plaintiff seeks is that of being able to say, 'Don't sell any goods under my mark.' He may find his customers fall off in consequence of the defendant's manufacture; but it does not necessarily follow that the plaintiff can claim damages for every article manufactured by the defendant, even though it be under that mark. On the other hand, every sale of a patented article must be a damage to the patentee."

(*a*) *Davenport* v. *Rylands*, L. R. 1 Eq. 302.

A suggestion has already been made as to the bearing of the mode of infringement upon the question of the assessment of damages, in respect of the loss of reputation sustained by the plaintiff (*a*).

Account in equity.

Except in cases in which the reputation of the plaintiff's goods has suffered severely on account of the inferior articles which the defendant had palmed off as the plaintiff's, the course usually adopted by the plaintiff was to claim to treat the defendant as having been the plaintiff's agent in selling the goods which the defendant had improperly marked, and accordingly to claim an account and payment by the defendant to the plaintiff of the profits which had been made by the sale of the marked articles.

Account of profits.

Peculiar to equity.

An account was a remedy practically peculiar to equity (*b*).

Instances of limitation or refusal of an account.

In one case the account was limited to commence at the date of the filing of the bill on account of the laches and collateral misconduct on the part of the plaintiff (*c*), and in the same case Mellish, L.J., referred to an account in such terms as would make it appear that it ought not to be granted in cases where nominal damages only would be recoverable at law.

Accounts against

In the case of *Cartier* v. *Carlile* (*d*) the

(*a*) *Ante*, page 20.

(*b*) As to the action of account at common law, see Bullen and Leake's Precedents.

(*c*) *Ford* v. *Foster*, L. R. 7 Ch. 611.

(*d*) 31 Beav. 292, 8 Jur. (N. S.) 183.

innocent infringers.

late Master of the Rolls granted an account against an innocent infringer. In the following year Lord Westbury, in a case in which the point was not material, and *Cartier* v. *Carlile* was not cited, said:

> "It is well founded in reason, and also settled by decision, that if A. has acquired property in a trade mark which is afterwards adopted and used by B. in ignorance of A.'s right, A. is entitled to an injunction; yet he is not entitled to any account of profits or compensation, except in respect of any user by B. after he became aware of the prior ownership" (*a*).

And in a case which subsequently came before the same Master of the Rolls he followed the dictum in *Edelsten* v. *Edelsten*, but made no reference to the case of *Cartier* v. *Carlile*, which was cited to him (*b*).

In most of the reported trade mark cases, an account against an innocent infringer has been waived (*c*).

It is somewhat difficult to reconcile all the cases referred to above, either with one another or with principle; but it is submitted that, however hard it may appear upon an innocent infringer, and however ungenerous it may be for

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(*a*) *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185 at p. 199.
(*b*) *Moet* v. *Couston*, 33 Beav. 578, 10 Jur. N. S. 1012.
(*c*) E. g. *Millington* v. *Fox*, 3 My. & Cr. 338; *Burgess* v. *Hills*, 26 Beav. 244; *Burgess* v. *Hately*, *ib.* 249.

the plaintiff to insist upon an account in such cases, yet that a plaintiff who is not in any default, should be considered entitled to an account of the profits properly attributable (*a*) to the improper use of the mark by the defendant.

Limit of account.

The account was limited to the six years prior to the filing of the bill (*b*).

Several owners.

When one of two persons, each entitled as against the rest of the world to the exclusive use of a trade mark, asked for an account of profits made by the infringer, and payment by him of the portion of the profits to which the Court might hold the plaintiff entitled, the account was ordered (*c*).

Specific relief under Act of 1862.

As to the destruction or disposal of chattels to which a mark has been improperly applied see sections 2, 3, and 21 of the Act of 1862 (*d*).

Other specific relief.

Various instances (*e*) have occurred in which the Court of Chancery has ordered specific relief of a similar character, interfering more or less with the defendant's rights of property, and without reference to the Act of 1862.

(*a*) See directions on this point in *Cartier* v. *Carlile*, 31 Beav. 292 ; 8 Jur. (N. S.) 183.

(*b*) *Cartier* v. *Carlile*, *ubi suprà*. See also L. R. 7 Ch. 633.

(*c*) *Dent* v. *Turpin*, 2 J. & H. 139, 30 L. J. Ch. 495.

(*d*) Pages 46, 49, and 66.

(*e*) Sed quære; How far they are capable of being reconciled with the principle of *Colburn* v. *Simms*, 2 Hare, 543.

Thus, in *Upmann* v. *Elkan* (*a*), where certain boxes of cigars to which the plaintiffs' brand had been fraudulently applied were in the hands of innocent consignees, it was ordered that if the consignors did not intervene the brands of the plaintiffs should be erased from the boxes of cigars in the bill mentioned, and that the plaintiffs should have a lien on the boxes of cigars bearing the brand of the plaintiffs, for certain costs mentioned in the order.

So, too, in *Farina* v. *Silverlock* (*b*) a decree was made for the delivery up to the plaintiff of the defendant's stock of labels, which were colourable imitations of the plaintiff's labels.

Again, in another case (*c*), which was not however a trade mark case, part of the decree was that Messrs. Day and Son should give up to the plaintiff certain lithographic plates, and any documents printed or lithographed therefrom. The report does not state, but it would appear that the plates were to be restored to Messrs. Day and Son when defaced.

Defences.

The defences which have been commonly made in cases of infringement are suggested by the topics already mentioned. They consisted usually of one or more of the following points :—

(1.) Denial of the plaintiff's having acquired the

(*a*) L. R. 12 Eq. 140, affirmed on appeal *ib.* 7 Ch. 130. See also *Ponsardin* v. *Peto*, 33 Beav. 642; 32 L. J. Ch. 371.

(*b*) See report in 4 K. & J. 650.

(*c*) *Emperor of Austria* v. *Day*, 3 De G. F. & J. 217.

right he claims, raising the questions of exclusive public user (*a*) and *publici juris*.

(2.) Assertion that the defendant has lost his right by abandonment or acquiescence (*b*).

(3.) That the maxim *ex turpi causâ non oritur actio* applies (*c*).

(4.) Denial of infringement (*d*).

(5.) In common law cases, that the defendant's guilty knowledge had not been shewn (*e*).

(6.) Upon the question of costs, that the defendant offered the plaintiff all the redress and satisfaction to which he was entitled before the hearing (*f*).

Laches and delay on the plaintiff's part may also be available against him, but in considering the question of delay, it must not be forgotten that the plaintiffs are justified in waiting to collect evidence of actual deception, so as not to have to call upon the Court to decide on grounds of conjecture (*g*), and also that delay on the part of the plaintiff will be no reason against granting an injunction, if the nature of the injunction is such that, even if it is granted, the defendant will not have been injured by the delay (*h*).

(*a*) *Ante*, page 5.
(*b*) See page 15.
(*c*) See page 7.
(*d*) See page 17.
(*e*) See page 26.
(*f*) See cases cited on the question of costs, page 34.
(*g*) *Lee* v. *Haley*, L. R. 5 Ch. 155.
(*h*) *Lee* v. *Haley*, *ubi suprd.*

Costs.

The costs of all proceedings in the High Court are in the discretion of the Court (*a*); but the Court will be guided in their discretion by the older cases, and where proper by the enactments in the Act of 1862 (*b*).

As a general rule the costs would be given to the successful party.

Where the defendant is an innocent infringer, and upon receiving notice of the plaintiff's claim offers to give him all he can obtain by a suit, an undertaking not to continue the infringement, compensation, and the costs of all proceedings the plaintiff has already taken, the plaintiff will not get his costs; but if the defendant needlessly dispute the plaintiff's claim, or does not offer him all he can claim, the costs will follow the event (*c*).

In a case where the Court held that both parties were in the wrong, no costs were given to either side (*d*); which was also the case where both parties were engaged in vending an article used for the deception of the public (*e*).

(*a*) Ord. LV. of the first Sched. to the Jud. Act, 1875.

(*b*) See that Act, *post*.

(*c*) *Millington* v. *Fox*, 3 My. & Cr. 338; *Burgess* v. *Hills*, 26 Beav. 244; *Burgess* v. *Hately*, *ib.* 249. See also remarks of the V.C. in *M'Andrew* v. *Bassett*, 33 L. J. Ch. 561, 4 N. R. 12.

(*d*) *Moet* v. *Couston*, 33 Beav. 578; 10 Jur. (N. S.) 1012.

(*e*) *Estcourt* v. *Estcourt Hop Essence Co.*, L. R. 10 Ch. 276.

PART II

Contains practical suggestions as to the selection of trade marks and directions as to obtaining registration.

Reasons for registering.

The Trade Mark Registration Act provides that from and after the 1st of July, 1876, a person shall not be entitled to institute any proceeding to prevent the infringement of any trade mark as defined by the Act, until and unless such trade mark is registered in pursuance of the Act.

The reason, therefore, for registering is plain to all traders who value the reputation which attaches to a trade mark.

Advantages.

In return for the compulsion thus put upon the trader to register, the act greatly facilitates the proof of his title to use the mark—which was formerly often a matter of extreme difficulty, proof of exclusive public user being required—and the discovery of information as to marks already in use.

Registration is by sec. 3 of the Act, made for the first five years *primâ facie*, and subsequently incontrovertible proof of the right to the exclusive use of the mark.

When registration is determined upon, the first point to be decided is of what the trade mark shall consist.

Suggestions as to the selection of a trade mark.

When the trader has a trade mark already in use, under which his goods have obtained a valuable repute in the market and with his business connections, he will naturally seek to register that mark, unless he knows of anyone who claims a conflicting right to use the same or a similar mark, and who will be likely to oppose his registration; in which case the intending registeree will consider whether the use of the old trade mark is of sufficient value to him to make it worth his while to combat that opposition; if not, he will select a new trade mark.

There is a provision made in the 10th section of the Act defining what may be registered as a trade mark, in favour of trade marks in use as trade marks before August 13th, 1875, so that there will rarely be any difficulty in registering such old trade marks, although they may not come within the definition of the Act adopted for new trade marks. If, however, that which has been used as a trade mark does not correspond with the general notion of a trade mark, stronger evidence of its use as a trade mark will probably be required by the Registrar, than in ordinary cases.

Those who have adopted a trade mark since August 13th, 1875, must compare their trade mark with the definition in the Act (sec. 10 p. 87), and see that their mark corresponds with the ordinary definition there given; as the provision in favour of a wider definition in cases of what may be called old trade marks does not

extend to marks adopted since August 13th, 1875.

When therefore, the mark adopted since August 13th, 1875, does not correspond with the definition in the Act, a new one must be chosen.

When a new mark is selected instead of one already in use, the new one should be made as like the old one as is consistent with its being made to correspond with the definition in the Act, and the general purposes of a trade mark; in order that the public and the trade may, even if they perceive any differences, recognize the new mark as being that of the person who formerly used the old mark.

Previously to selecting a new trade mark, the definition in the Act should be carefully read through, in order that the mark may be made to contain one or more of the particulars of a trade mark, made essential by the Act.

Care should also be taken to avoid selecting a mark resembling that of any other person in the same trade, in order that no excuse may be given for opposition to the registration, or for mistake in the market.

Generally in selecting a mark care should be taken to make it plain and distinct in order that it may be easily remembered and recognized by a careless purchaser, and also that it should so refer to the user of the mark that the purchaser may, if he wishes to give fresh orders, have no difficulty in discovering the name and address of the user.

Where the trade is in articles which are to be sold to people who cannot read without trouble at home, or are meant for foreign trade, a symbol or device of some kind should also be used.

In making a trade mark plain and simple, care must be taken to make it include all that the trader intends to use as a trade mark. In other words, when a trade mark is selected, no other mark should be used for the purpose of a trade mark lest that other mark be infringed, and the object of registration frustrated.

Thus if A. wishes to use the symbol of a bear and also to mark his goods with the fancy term "Arctic Brand," he should not register his bear alone, or he would not be able to institute proceedings to prevent B. marking his goods with a walrus, and the words "Arctic Brand."

Whether it is expedient to employ several trade marks, having a special one for each class of goods, so that each class of goods may get a name of its own, or to use one mark on all the goods dealt in, is a practical question, which deserves consideration.

On the one hand, it might be difficult to find an attractive mark appropriate to different kinds of goods, and on the other hand it must be remembered that, where only one mark is employed, the reputation gained by the quality of one article would tend to obtain for the other articles on which the same mark appeared, a corresponding reputation in the market.

Subject to the foregoing remarks, it is suggested

that a simple symbol with the proprietor's name above and address below, the date of establishment or registration on each side of, and the fancy name, or name of the brand (if any) across the symbol, is one of the most convenient forms of trade mark to adopt.

Each trade mark which is selected will have to be registered in respect of certain goods or classes of goods. The first schedule to the rules should be looked through, and it should be ascertained to which of the 50 classes into which goods are there divided, the goods to which the trade mark is to be applied, belong. Directions for obtaining registration.

If the goods may be considered as belonging to two or more classes, the trader may apply to have the trade mark registered in each class, or he may rely upon the protection afforded by rule 19, and only apply to be registered in one of the classes. Rule 4.

If he applies to be registered in one class only and there is any doubt whether he has selected the right class, the Registrar has power to determine the doubt. Rule 3.

The rules do not state what course is to be pursued when more than one person apply for registration (*a*), but all questions will probably be avoided if, when a firm desires to register, all the partners join in the application.

When a mark is to be registered for a company, the application should be made by the secretary or other principal officer, who should be furnished Rule 10.

(*a*) See, however, Rule 10.

with the means of proving to the Registrar's satisfaction that the application is duly authorised.

Rule 60. As to the cases where the application is to be made on behalf of an infant, a lunatic, or other person under disability, see rule 60.

On application for registration the following documents are required to be sent in (1) a statement, (2) two representations of the trade mark, (3) a declaration, and (4) an account of the fees payable on application, with a P.O.O., or if the amount be over £5, a cheque for the amount.

The above should be prepared on separate pieces of foolscap paper, of a uniform size of 13 inches by 8 inches, having a margin of not less than one inch and a half left blank down the left side of the page.

Rules 6 & 7. (1) *The Statement.*—Rules 6 and 7 should be read, and the statement prepared accordingly, Form A or B in schedule 3, whichever is applicable, being taken as a guide, and attention being paid to the marginal notes to the form selected.

Rule 8. (2) *The Representations of the Trade Mark.*—See rule 8, which gives full directions.

It will be advisable to have an additional copy made of this and the other papers sent in, and to preserve them for reference.

Rule 9. (3) *The Declaration.*—Read rule 9, and prepare the declaration accordingly, taking the form C in schedule 3 as a guide.

Rule 57. If from any reasonable cause, the person who ought to make the declaration cannot do so, the Registrar has power, upon the production of such

other declaration, and subject to such terms as he may think fit, to dispense with the regular declaration.

The declaration being prepared recourse must be had under rule 58 to a justice of the peace, or other person authorised to administer an oath on legal matters, and the declaration must be made and signed before him, and his signature or seal thereto obtained. Rule 58.

(4) *Fees.*—Another paper must be prepared containing (i.) the name and address of the applicant, (ii.) an account of the fees payable in respect of the application. What the fees on application are will be found by reference to schedule 2. Sched. 2.

A specimen of this last paper will be found at p. 97 in the note to rule 5.

Attached to this paper must be a P.O.O. for the amount of the fees if under £5, and either a P.O.O. or cheque if the fees exceed £5.

P. O. Orders should be made payable to the Registrar at the General Post Office, London. Cheques should be drawn payable to the "Registrar of Trade Marks or Bearer," and crossed "Bank of England."

Application for registration should then be made by sending in the above mentioned papers, either by hand, or prepaid by post, addressed to Rule 62.

The Registrar,
Trade Marks Registry Office, Quality Court,
47, Chancery Lane, W.C.

If they are sent by post, a memorandum of the

fact and date should be taken at the time of posting, to facilitate proof thereof if it should become important.

The Registrar will acknowledge the receipt of the application.

Rule 12. The next step taken will be on the part of the Registrar, who, either with the acknowledgment last mentioned, or shortly afterwards, will send to the applicant a requisition instructing him to insert in the "official paper" an advertisement of his application. The Registrar may also require the applicant to furnish the

Rule 11. printer with a block or other means of advertising the intended mark. If any opposition is raised to the proposed registration, the opposing

See Rule 15 and note thereon. party will take action under rule 15, and the dispute will be decided in the manner provided by that rule and the rules in connection therewith.

Rule 16. After the lapse of three months from the first appearance of the advertisement the Registrar may, if he be satisfied that the applicant is entitled to registration, proceed to make the registration on payment of the required fee. What this fee will be can be ascertained by reference to the schedule 2.

The Registrar will, it is presumed, give the applicant notice when he is to forward the registration fees.

Rule 20. When the registration is complete it will date from the time of application for registration.

Rule 21. The Registrar will send notice to the applicant of the fact of registration.

THE

MERCHANDISE MARKS ACT

(25 & 26 Vic. c. 88).

An Act to amend the Law relating to the fraudulent marking of Merchandise.

[*7th August*, 1862.]

WHEREAS it is expedient to amend the Laws relating to the fraudulent marking of Merchandise, and to the sale of Merchandise falsely marked for the purpose of fraud: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows: M. M. Act, 1862, s. 1.

1. In the construction of this Act the word 'person' shall include any person, whether a subject of Her Majesty or not, and any body corporate or body of the like nature, whether constituted according to the law of this country or of any of Her Majesty's colonies or dominions, or according to the law of any foreign country, and also any company, association, or society of persons, whether the members thereof be subjects of Her Majesty or not, or some of such persons Construction of Words.

M. M. Act, 1862, s. 1.

subjects of Her Majesty and some of them not, and whether such body corporate, body of the like nature, company, association, or society be established or carry on business within Her Majesty's dominions or elsewhere, or partly within Her Majesty's dominions and partly elsewhere; the word 'Mark' shall include any name, signature, word, letter, device, emblem, figure, sign, seal, stamp, diagram, label, ticket, or other mark of any other description; and the expression 'Trade Mark' shall include any and every such name, signature, word, letter, device, emblem, figure, sign, seal, stamp, diagram, label, ticket, or other mark as aforesaid lawfully used by any person to denote any chattel, or (in *Scotland*) any article of trade, manufacture, or merchandise, to be an article or thing of the manufacture, workmanship, production, or merchandise of such person, or to be an article or thing of any peculiar or particular description made or sold by such person, and shall also include any name, signature, word, letter, number, figure, mark, or sign which in pursuance of any statute or statutes for the time being in force relating to registered designs is to be put or placed upon or attached to any chattel or article during the existence or continuance of any copyright or other sole right acquired under the provisions of such statutes or any of them; the word 'Misdemeanor' shall include crime and offence in *Scotland;* and the word 'Court' shall include any Sheriff or Sheriff substitute in *Scotland.*"

The Act of 1875, sec. 10 (87) gives a definition of a trade mark for the purposes of that Act. M M. Act, 1862, s. 2.

It will be observed that the definition here given of a trade mark, includes the fact of lawful use. Therefore, if the trade mark itself contain a misrepresentation, so calculated to deceive the public that it cannot be lawfully used, no criminal proceedings under this Act can be taken against an infringer. It appears from the report of *Morgan* v. *McAdam*, in Chancery (26 L. J. Ch. 228), that in that case proceedings under this Act were successfully resisted upon this ground.

The statutes at the present time in force relating to registered designs, are the Act 38 & 39 Vic. c. 93, and the Acts enumerated in the schedule thereto. The Act 38 & 39 Vic. c. 93, transfers the powers and duties of the Board of Trade, and of the Registrar, under the copyright of Designs Acts, to the Commissioners of Patents.

Forging a trade mark or falsely applying any trade mark with intent to defraud, a misdemeanor.

2. Every person who, with intent to defraud, or to enable another to defraud any person, shall forge or counterfeit, or cause or procure to be forged or counterfeited, any trade mark, or shall apply, or cause or procure to be applied, any trade mark or any forged or counterfeited trade mark to any chattel or article not being the manufacture, workmanship, production, or merchandise of any person denoted or intended to be denoted by such trade mark, or denoted or intended to be denoted by such forged or counterfeited trade mark, or not being the manufacture, workmanship, production, or merchandise of any person whose trade mark shall be so forged or counterfeited, or shall apply, or cause or procure to be applied, any trade mark or any forged or counterfeited trade mark to any chattel or article, not

M. M. Act, 1862. being the particular or peculiar description of manufacture, workmanship, production, or merchandise denoted or intended to be denoted by such trade mark or by such forged or counterfeited trade mark, shall be guilty of a misdemeanor, and every person so committing a misdemeanor shall also forfeit to Her Majesty every chattel and article belonging to such person to which he shall have so unlawfully applied, or caused or procured to be applied, any such trade mark or forged or counterfeited trade mark as aforesaid, and every instrument in the possession or power of such person, and by means of which any such trade mark or forged or counterfeited trade mark as aforesaid shall have been so applied, and every instrument in the possession or power of such person for applying any such trade mark or forged or counterfeit trade mark as aforesaid, shall be forfeited to Her Majesty; and the Court before which any such misdemeanor shall be tried may order such forfeited articles as aforesaid to be destroyed or otherwise disposed of as such Court shall think fit.

As to the intention to defraud see *sec.* 12.

As to the punishment of the misdemeanors constituted by this Act, see *sec.* 14.

The operation of this and the following section is extended by sec. 5 to cases where genuine trade marks are so added to or altered as to resemble another genuine trade mark, or in such a manner as to be calculated or liable to deceive.

The definitions of forgery at common law adopted in "Russell on Crimes," the modern standard work upon the subject, are: "the fraudulent making or alteration of a

writing to the prejudice of another man's right," and "a false making or making *malo animo* of any written instrument for the purposes of fraud or deceit," the word making being in this last definition, considered as including every alteration of or addition to a true instrument. M. M. Act, 1862.

The principal statute as to this offence, is the consolidating and amending Act 24 & 25 Vic. c. 98, itself amended by 33 & 34 Vic. c. 58.

It will be observed that the mischief against which this act is directed, does not come within the usual definition of a forgery. The following cases bear this out, and shew that the dishonest use of trade marks, where money has been obtained thereby, may be given in evidence in support of a count for obtaining money under false pretences.

In the case of *Reg.* v. *Smith* (1 Dears and B. C. C. 566 and 27 L. J. M. C. 225), which occurred in 1858, the jury having in effect found, by the verdict of guilty, that the prisoner had used on the wrappers to his own baking powders, labels which so far resembled those used by Borwick the prosecutor, as to deceive persons of ordinary observation and to make them believe them to be Borwick's labels, and that they were made and altered by the prisoner with intent to defraud the different purchasers by so deceiving them; the point that the making or altering such document did not constitute forgery was reserved and afterwards decided in the prisoner's favour. Willes, J., in giving judgment pointed out that it was absurd to suppose that the prisoner had committed as many forgeries as he had distributed wrappers, and "that the fraud consisted in putting inside the wrappers powder which was not genuine, and selling that," and that he might have been indicted for obtaining money under false pretences.

In *Reg.* v. *Closs* (1 Dears & B. 460, 27 L. J. M. C. 541) it was held that painting an artist's name on a copy not by him of his picture, in order to pass it off as his, was not a forgery. The second count was for a cheat at common law, as to which Cockburn, C. J., said :—

"We have carefully examined the authorities, and the

M. M. Act, 1862. result is we think if a person in the course of his trade, openly and publicly carried on, were to put a false mark or token upon an article so as to pass it off as a genuine one, when in fact it was only a spurious one, and the article was sold and money obtained by means of that false mark or token, that would be a cheat at common law."

In *Reg.* v. *Dundas* (6 Cox, C.C. 380) the prisoner was convicted of obtaining money under false pretences, the cheat being the passing off a spurious article as a true one, and a spurious label being one of the means employed.

A false representation that a stamp on a watch was the hall mark of the Goldsmiths' Company was held indictable, and the prisoner convicted on proof that the mark on the case was not the hall mark, but a counterfeited imitation in *Reg.* v. *Suter and Coulson*, 10 Cox C.C. 577.

As to false pretences generally, see 24 & 25 Vic. c. 96, s. 88, Russell on Crimes, and Roscoe's Evidence in Criminal Cases.

Applying a forged trade mark to any vessel, case, wrapper, &c., in or with which any article is sold or intended to be sold, a misdemeanor.

3. Every person who, with intend to defraud, or to enable another to defraud, any person, shall apply or cause or procure to be applied any trade mark or any forged or counterfeited trade mark to any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing in, on, or with which any chattel or article shall be intended to be sold or shall be sold or uttered or exposed for sale, or intended for any purpose of trade or manufacture, or shall enclose or place any chattel or article, or cause or procure any chattel or article to be enclosed or placed in, upon, under, or with any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing

to which any trade mark shall have been falsely applied, or to which any forged or counterfeited trade mark shall have been applied, or shall apply or attach or cause or procure to be applied or attached to any chattel or article any case, cover, reel, ticket, label, or other thing to which any trade mark shall have been falsely applied, or to which any forged or counterfeited trade mark shall have been applied, or shall enclose, place, or attach any chattel or article, or cause or procure any chattel or article to be enclosed, placed, or attached, in, upon, under, with, or to any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing having thereon any trade mark of any other person, shall be guilty of a misdemeanor, and every person so committing a misdemeanor shall also forfeit to Her Majesty every such chattel and article, and also every such cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing as aforesaid in the possession or power of such person; and every other similar cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing made to be used in like manner as aforesaid, and every instrument in the possession or power of such person, and by means of which any such trade mark or forged or counterfeited trade mark as aforesaid shall have been applied, and also every instrument in the possession or power of such person for applying any such trade mark or forged or counterfeit trade mark as aforesaid, shall be for- M. M. Act, 1862, s. 3.

M. M. Act, 1862, ss. 3, 4.

feited to Her Majesty; and the Court before which any such misdemeanor shall be tried may order such forfeited articles as aforesaid to be destroyed or otherwise disposed of as such Court shall think fit.

Section 2 is directed against the application of a fraudulent mark to an article itself; sec. 3 is directed against the application of such mark, not to the article itself, but to the case in which it is packed or some other accessory of the article—the resulting deception being the same in both cases.

In the recent case of *Fisher* v. *Apollinaris Water Co.* (L. R. 10 Ch. 297; 44 L. J. Ch. 500) it was held that the compromise of an indictment under this section was lawful, and did not come within the principle of *Williams* v. *Bayley*, L. R. 1 H. L. 200.

Selling articles with forged or false trade marks after 31st December 1863. Penalty equal to value of article sold, and a sum not exceeding 5*l.* nor less than 10*s.*

4. Every person who, after the 31st day of December, 1863, shall sell, utter, or expose either for sale or for any purpose of trade or manufacture, or cause or procure to be sold, uttered, or exposed for sale or other purpose as aforesaid, any chattel or article, together with any forged or counterfeited trade mark, which he shall know to be forged or counterfeited, or together with the trade mark of any other person applied or used falsely or wrongfully or without lawful authority or excuse, knowing such trade mark of another person to have been so applied or used as aforesaid, and that whether any such trade mark or forged or counterfeited trade mark as aforesaid, together with which any such chattel or article shall be sold, uttered, or exposed for sale or other purpose as aforesaid, shall be in, upon, about, or with such chattel or article, or in, upon, about, or

with any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing in, upon, about, or with which such chattel or article shall be so sold or uttered or exposed for sale or other purpose as aforesaid, shall for every such offence forfeit and pay to Her Majesty a sum of money equal to the value of the chattel or article so sold, uttered, offered, or exposed for sale or other purpose as aforesaid, and a further sum not exceeding £5, and not less than 10s. M. M. Act, 1862, ss. 4, 5.

This section is directed against fraudulent dealings with goods, in respect of which the misdemeanors created by secs. 2 and 3 may have been already committed. No one could deal with goods in the manner and with the intent mentioned in secs. 2 and 3 without a guilty knowledge, which is not, therefore, mentioned in these sections as an ingredient in the offence; but, as goods with fraudulent marks on or attached to them may but ought not to be sold or otherwise dealt with as mentioned in sec. 4 by a person innocent of actual intent to defraud, knowledge alone will here constitute the animus of the offence, and by sec. 6 a refusal to give information as to the person from whom, and the time at which goods dealt with as mentioned in sec. 4 were obtained, is made *prima facie* evidence of such guilty knowledge. As to the civil remedies of the "proprietor" of the trade mark, when the goods bearing a false mark are in the hands of innocent holders, and the duties of such innocent holders, see *Upman* v. *Elkan*, L. R. 12 Eq. 140, and s.c. L. R. 7 Ch. 130.

As to the recovery of penalties under this Act, see sec. 15.

Additions to and alterations of trade marks made with intent to defraud to be

5. Every addition to and every alteration of and also every imitation of any trade mark which shall be made, applied, or used with intent to defraud or to enable any other person to defraud,

M. M. Act, 1862, ss. 5, 6. deemed forgeries.

or which shall cause a trade mark with such alteration or addition, or shall cause such imitation of a trade mark, to resemble any genuine trade mark so or in such manner as to be calculated or likely to deceive, shall be and be deemed to be a false, forged, and counterfeited trade mark within the meaning of this Act; and every act of making, applying, or otherwise using any such addition to or alteration of a trade mark or any such imitation of a trade mark as aforesaid done by any person with intent to defraud, or to enable any other person to defraud, shall be and be deemed to be forging and counterfeiting a trade mark within the meaning of this Act.

See sects. 2 and 3.

Any Person who, after 31st December, 1863, shall have sold an article having a false trade mark to be bound to give information where he procured it.

6. Where any person who, at any time after the 31st day of *December*, 1863, shall have sold, uttered, or exposed for sale or other purpose as aforesaid, or shall have caused or procured to be sold, uttered, or exposed for sale or other purpose as aforesaid, any chattel or article, together with any forged or counterfeited trade mark, or together with the trade mark of any other person used without lawful authority or excuse as aforesaid, and that whether any such trade mark, or such forged or counterfeited trade mark as aforesaid, be in, upon, about, or with such chattel or article, or in, upon, about, or with any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing in, upon, about, or with which such chattel or article shall have

been sold or exposed for sale, such person shall be bound, upon demand in writing delivered to him or left for him at his last known dwelling-house or at the place of sale or exposure for sale by or on the behalf of any person whose trade mark shall have been so forged or counterfeited or used without lawful authority or excuse as aforesaid, to give to the person requiring the same or his attorney or agent, within forty-eight hours after such demand, full information in writing of the name and address of the person from whom he shall have purchased or obtained such chattel or article, and of the time when he obtained the same; and it shall be lawful for any justice of the peace, on information on oath of such demand and refusal, to summon before him the party refusing, and, on being satisfied that such demand ought to be complied with, to order such information to be given within a certain time to be appointed by him; and any such party who shall refuse or neglect to comply with such order shall for every such offence forfeit and pay to Her Majesty the sum of £5, and such refusal or neglect shall be *primâ facie* evidence that the person so refusing or neglecting had full knowledge that the trade mark, together with which such chattel or article was sold, uttered, or exposed for sale or other purpose as aforesaid, at the time of such selling, uttering, or exposing was a forged, counterfeited, and false trade mark, or was the trade mark of a person which had been used without lawful authority or excuse, as the case may be.

M. M. Act, 1862, s. 6.

Power to justices to summon parties refusing to give information.

Penalty for refusal 5*l.*

M M. Act, 1862, ss. 6, 7.

This section makes it important for a trader to keep his stock accounts in such a manner as to enable him readily to give the information here mentioned. Inability to give the information would not, it is presumed, be a ground of relief against the penalties here imposed upon neglect, and in the case of proceedings being instituted against him under sec. 4 the trader would have to prove his innocence instead of being able in the first instance to call upon the other side to prove his guilty knowledge. When goods with improper marks thereon are in the hands of innocent consignees, wharfingers, and others, who are at the most distributors, and not vendors, and cannot be said even to procure a sale of the goods, the owner of the trade mark is not without remedy, as he can obtain the removal of the marks by civil proceedings for an injunction (*a*). As to what course such innocent persons should pursue on becoming acquainted with the facts, see the cases cited below (*a*).

Marking any false indication of quantity, &c., upon an article with intent to defraud, Penalty a sum equal to the value of the article and a further sum not exceeding 5*l.* and not less than 10*s.*

7. Every person who, with intent to defraud or to enable another to defraud, shall put or cause or procure to be put upon any chattel or article, or upon any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing, together with which any chattel or article shall be intended to be or shall be sold or uttered or exposed for sale, or for any purpose of trade or manufacture, or upon any case, frame, or other thing in or by means of which any chattel or article shall be intended to be or shall be exposed for sale, any false description,

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(*a*) *Ponsardin* v. *Peto*, 33 Beav. 642, 33 L. J. Ch. 371; *Hunt* v. *Maniere*, 34 Beav. 157; *Upman* v. *Elkan*, L. R. 12 Eq. 140, *Ib.* 7 Ch. 130.

statement, or other indication of or respecting the number, quantity, measure, or weight of such chattel or article, or any part thereof, or of the place or country in which such chattel or article shall have been made, manufactured, or produced, or shall put or cause or procure to be put upon any such chattel or article, cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or thing as aforesaid, any word, letter, figure, signature, or mark for the purpose of falsely indicating such chattel or article, or the mode of manufacturing or producing the same, or the ornamentation, shape, or configuration thereto, to be the subject of any existing patent, privilege, or copyright, shall for every such offence forfeit and pay to Her Majesty a sum of money equal to the value of the chattel or article so sold or uttered or exposed for sale, and a further sum not exceeding five pounds and not less than ten shillings. M. M. Act, 1862, s. 7.

This section would probably have had greater effect if the Act had provided for the appointment of some one whose duty it should be to take action thereunder.

An article may be falsely indicated as being the subject of an existing patent, either when there is an existing patent as to such articles and the particular article is not the subject thereof, or when there is no such patent in existence. It does not clearly appear whether the Act was intended to apply to both these cases or only the former, but in any case it must be remembered that fraudulent intent is an essential ingredient in the offence, and that there are many cases in which the word "patent" occurs in a trade mark, the right to which was gained by

M. M. Act, 1862, s. 8. use during the continuance of the patent, and in which the trade mark has continued, after the expiry of the patent, to be used in the same form, when the whole world might know that the patent has expired and the word is simply used as a description of the article (*Sykes* v. *Sykes*, 3 B. & C. 541, *Ford* v. *Foster*, L. R. 7 Ch. 611, p. 631). For an instance of the word patent being honestly used without any reference to Letters Patent see *Marshall* v. *Ross*, L. R. 8 Eq. 651.

This and the following section are modified by the proviso contained in the 9th section.

Selling or exposing for sale after the 31st December, 1863 articles with false statement of quantities, &c., Penalty not more than 5*l.* or less than 5*s.*

8. Every person who, after the 31st day of December, 1863, shall sell, utter, or expose for sale or for any purpose of trade or manufacture, or shall cause or procure to be sold, uttered, or exposed for sale or other purpose as aforesaid, any chattel or article upon which shall have been, to his knowledge, put, or upon any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing, together with which such chattel or article shall be sold or uttered or exposed for sale or other purpose as aforesaid, shall have been so put, or upon any case, frame, or other thing used or employed to expose or exhibit such chattel or article for sale shall have been so put, any false description, statement, or other indication of or respecting the number, quantity, measure, or weight of such chattel or article or any part thereof, or the place or country in which such chattel or article shall have been made, manufactured, or produced, shall for every such offence forfeit and pay to Her Majesty a sum not exceeding £5 and not less than 5*s.*

It will be noticed that no reference to the false indication of articles or chattels being "the subject of an existing patent, &c.," is made in this section as in the 7th section; so that an article, in respect of which the manufacturer had been fined, for placing thereon a mark for the purpose of indicating that it was the subject of an existing patent, might be sold by the retail dealer without liability under the 8th section. M. M. Act, 1862, ss. 9, 10.

Proviso that it shall not be an offence to apply names or words known to be used for indicating particular classes of manufactures.

9. Provided always, that the provisions of this Act shall not be construed so as to make it any offence for any person to apply to any chattel or article, or to any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing with which such chattel or article shall be sold or intended to be sold, any name, word, or expression generally used for indicating such chattel or article to be of some particular class or description of manufacture only, or so as to make it any offence for any person to sell, utter, or offer or expose for sale any chattel or article to which, or to any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing sold therewith, any such generally used name, word, or expression as aforesaid shall have been applied.

See note to section 7.

Description of trade marks and forged trade marks in indictments, &c.

10. In every indictment, pleading, proceeding, and document whatsoever, in which any trade mark shall be intended to be mentioned, it shall be sufficient to mention or state the same to be a trade mark, without further or otherwise describing such trade mark, or setting forth any copy or fac-simile thereof; and in every indictment,

M. M. Act, 1862, ss. 10, 11.

pleading, proceeding, and document whatsoever in which it shall be intended to mention any forged or counterfeit trade mark it shall be sufficient to mention or state the same to be a forged or counterfeit trade mark, without further or otherwise describing such forged or counterfeit trade mark, or setting forth any copy or fac-simile thereof.

Conviction not to affect any right or civil remedy.

11. The provisions in this Act contained of or concerning any act or any proceeding, judgment, or conviction for any act hereby declared to be a misdemeanor or offence, shall not nor shall any of them take away, diminish, or prejudicially affect any suit, process, proceeding, right, or remedy which any person aggrieved by such act may be entitled to at law, in equity, or otherwise, and shall not nor shall any of them exempt or excuse any person from answering or making discovery upon examination as a witness or upon interrogatories or otherwise in any suit or other civil proceeding: Provided always, that no evidence, statement or discovery which any person shall be compelled to give or make shall be admissible in evidence against such person in support of any indictment for a misdemeanor at common law or otherwise, or of any proceeding under the provisions of this Act.

The general principle as to concurrent civil and criminal proceeding is :—

"When the wrongful act amounts only to a misdemeanor the remedy for the wrong is not suspended until the offender has been brought to trial for the indictable

offence; but the injured party may at once bring an action for damages, whether he does or does not subsequently prosecute." Addison on Torts, 4th ed., p. 33, citing *Reg.* v. *Hardey*, 14 Q. B. 529, see also *Fisher* v. *Apollinaris Water Co.*, L. R. 10 Ch. 297; 44 L. J. Ch. 500; 32 L. T. 628. **M. M. Act, 1862, s. 12.**

The latter part of the section is inserted to prevent the application of the maxim *nemo tenetur seipsum prodere*, which allows a witness to refuse to answer "where the answer would have a tendency to expose the witness, or as it seems the husband or wife of the witness, to any kind of criminal charge, whether in common law or ecclesiastical courts, or to a penalty or forfeiture of any nature whatsoever." Taylor on Evidence, 6th ed., p. 1258, where the case of *Pye* v. *Butterfield*, 34 L. J. Q. B. 17, 5 B. & S. 829, is cited as to the limitations to be placed upon the words "penalty or forfeiture." In this case the authorities upon which the Court of Chancery used to act are referred to.

Intent to defraud, &c., any particular person need not be alleged in an indictment, &c., or proved.

12. In every indictment, information, conviction, pleading, and proceeding against any person for any misdemeanor or other offence against the provisions of this Act, in which it shall be necessary to allege or mention an intent to defraud, or to enable another to defraud, it shall be sufficient to allege or mention that the person accused of having done any act which is hereby made a misdemeanor or other offence did such act with intent to defraud, or with intent to enable some other person to defraud, without alleging or mentioning an intent to defraud any particular person; and on the trial of any such indictment or information for any such misdemeanor, and on the hearing of any information or charge of or for any such other offence as afore-

M. M. Act, 1862, ss. 12, 13, 14, 15.

said, and on the trial of any action against any person to recover a penalty for any such other offence as aforesaid, it shall not be necessary to prove an intent to defraud any particular person, or an intent to enable any particular person to defraud any particular person, but it shall be sufficient to prove with respect to every such misdemeanor and offence that the person accused did the act charged with intent to defraud, or with intent to enable some other person to defraud, or with the intent that any other person might be enabled to defraud.

Persons who aid in the commission of a misdemeanor to be also guilty.

13. Every person who shall aid, abet, counsel, or procure the commission of any offence which is by this Act made a misdemeanor shall also be guilty of a misdemeanor.

See sections 2 and 3.

Punishment for misdemeanor under this act.

14. Every person who shall be convicted or found guilty of any offence which is by this Act made a misdemeanor shall be liable, at the discretion of the Court and as the Court shall award, to suffer such punishment by imprisonment for not more than two years, with or without hard labour, or by fine or both by imprisonment with or without hard labour and fine, and also by imprisonment until the fine (if any) shall have been paid and satisfied.

Recovery of penalties.

15. In every case in which any person shall have committed or done any offence or act whereby he shall have forfeited or become liable to pay

to Her Majesty any of the penalties or sums of money mentioned in the provisions of this Act, every such penalty or sum of money shall or may be recovered in England, Wales, or Ireland in an action of debt, which any person may as plaintiff for and on behalf of Her Majesty commence and prosecute to judgment in any Court of Record, and the amount of every such penalty or sum of money to be recovered in any such action shall or may be determined by the jury (if any) sworn to try any issue in such action, and if there shall be no such jury then by the Court or some other jury, as the Court shall think fit, or instead of any such action being commenced such penalty or sum of money shall or may in England or Wales be recovered by a summary proceeding before two justices of the peace having jurisdiction in the county or place where the party offending shall reside or have any place of business, or in the county or place in which the offence shall have been committed; and shall or may in Ireland be recovered in like manner by civil bill in the Civil Bill Court of the county or place in which the offence was committed, or in which the offender shall reside or have any place of business; and shall or may in Scotland be recovered by action before the Court of Session in ordinary form or by summary action before the Sheriff of the county where the offence shall have been committed or the offender may reside or have any place of business, which Sheriff, upon proof of the offence, either by the confession of the person offending or by

M. M. Act, 1862, s. 15.

M. M. Act, 1862 ss. 15, 16.

the oath or affirmation of one or more credible witnesses, shall convict the offender, and find him liable in the penalty or penalties aforesaid as also in expenses; and it shall be lawful for the Sheriff in pronouncing such judgment for the penalty or penalties and costs to insert in such judgment a warrant in the event of such penalty or penalties and costs not being paid to levy and recover the amount of the same by poinding: provided always, that it shall be lawful to the Sheriff, in the event of his dismissing the action and assoilzing the defender, to find the complainer liable in expenses, and any judgment so to be pronounced by the Sheriff in such summary action shall be final and conclusive, and not subject to review by advocation, suspension, reduction, or otherwise.

See sect. 4 of the Debtor's Act, 1869, as to the exception from the abolition of imprisonment for debt in case of default in payment of penalties.

Summary proceedings before justices to be within 11 & 12 Vict. c. 3.

16. In every case in which any such penalty or sum of money forfeited to Her Majesty as herein-before mentioned shall be sought to be recovered by a summary proceeding before two justices of the peace, the offence or act by the committing or doing of which such penalty or sum of money shall have been so forfeited shall be and be deemed to be an offence and act within the meaning of a statute passed in the twelfth year of the reign of her present Majesty, intituled "an Act to facilitate the performance of the duties of justices of the peace out of sessions within

England and Wales with respect to summary convictions and orders;" and the information, conviction of the offender, and other proceedings for the recovery of the penalty or sum so forfeited, shall be had according to the provisions of the said Act. M. M. Act, 1862, ss. 16, 17.

Default in payment of a sum recovered summarily before a justice or justices of the peace is also within the exceptions of sec. 4 of the Debtors' Act, 1869.

17. In every case in which judgment shall be obtained in any such action as aforesaid for the amount of any such penalty or sum of money forfeited to Her Majesty, the amount thereof shall be paid by the defendant to the sheriff or the officer of the Court, who shall account for the same in like manner as other monies payable to Her Majesty, and, if it be not paid, may be recovered, or the amount thereof levied, or the payment thereof enforced, by execution or other proper proceeding, as money due to Her Majesty; and the plaintiff suing on behalf of Her Majesty, upon obtaining judgment, shall be entitled to recover and have execution for all his costs of suit, which shall include a full indemnity for all costs and charges which he shall or may have expended or incurred in, about, or for the purposes of the action, unless the Court, or a Judge thereof, shall direct that costs of the ordinary amount only shall be allowed. In actions penalties to be accounted for in like manner as other monies payable to the crown and plaintiffs to recover full costs of suit.

This section appears to have *been impliedly repealed* as to the High Court of Justice, for, by order 55 of the rules of court made under the Judicature Act, 1875, the costs

M. M. Act, 1862, ss. 18, 19. of all proceedings in the High Court are to be in the discretion of the Court; but, if proceedings for the recovery of penalties are taken in the High Court, it is presumed that the discretion of the Court would be guided by the enactment as to the title of the plaintiff to the full costs mentioned in this section.

Limitations of actions, &c.

18. No person shall commence any action or proceeding for the recovery of any penalty, or procuring the conviction of any offender in manner herein-before provided, after the expiration of three years next after the committing of the offence, or one year next after the first discovery thereof by the person proceeding.

After 31st December, 1863, vendor of an article with a trade mark to be deemed to contract that the mark is genuine.

19. In every case in which at any time after the 31st day of December, 1863, any person shall sell, or contract to sell (whether by writing or not), to any other person, any chattel or article with any trade mark thereon, or upon any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing, together with which such chattel or article shall be sold or contracted to be sold, the sale or contract to sell shall in every such case be deemed to have been made with a warranty or contract by the vendor to or with the vendee that every trade mark upon such chattel or article, or upon any such cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing as aforesaid, was genuine and true, and not forged or counterfeit, and not wrongfully used, unless the contrary shall be expressed in some writing signed by or on

behalf of the vendor, and delivered to and accepted by the vendee. **M. M. Act, 1862, s. 20.**

20. In every case in which at any time after the 31st day of December, 1863, any person shall sell or contract to sell (whether by writing or not) to any other person any chattel or article upon which, or upon any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing together with which such chattel or article shall be sold or contracted to be sold, any description, statement, or other indication of or respecting the number, quantity, measure, or weight of such chattel or article, or the place or country in which such chattel or article shall have been made, manufactured, or produced, the sale or contract to sell shall in every such case be deemed to have been made with a warranty or contract by the vendor to or with the vendee that no such description, statement, or other indication was in any material respect false or untrue, unless the contrary shall be expressed in some writing signed by, or on behalf of the vendor, and delivered to and accepted by the vendee. After 31st December, 1863, vendor of an article with description upon it of its quantity to be deemed to contract that the description was true.

In the Acts regulating the sale of hops, 48 Geo. 3, c. 134; 54 Geo. 3, c. 123, and "The Hop (Prevention of Frauds) Act, 1866," (29 Vic. c. 37) provision is made for marking every bag or pocket of hops with certain particulars, and by sec. 18 of 29 Vic. c. 37, it is enacted that every person "who shall sell any hops in any bag or pocket having marked thereon any name, description, date, trade mark or symbol intended to indicate the

M. M. Act, 1862, s. 21. name of the person by whom, or the parish, county, or place where, or the year when the said hops were grown, shall be deemed to contract that the said description, date, trade mark and symbol were genuine and true, and that such description, date, trade mark and symbol were in accordance" with that Act and the above mentioned Acts of Geo. 3.

In suits at law or in equity against persons for using forged trade marks, court may order article to be destroyed, and may award injunction, &c.

21. In every case in any suit at law or in equity against any person for forging or counterfeiting any trade mark, or for fraudulently applying any trade mark to any chattel or article, or for selling, exposing for sale, or uttering any chattel or article with any trade mark falsely or wrongfully applied thereto, or with any forged or counterfeit trade mark applied thereto, or for preventing the repetition or continuance of any such wrongful act, or the committal of any similar act, in which the plaintiff shall obtain a judgment or decree against the defendant, the Court shall have power to direct every such chattel and article to be destroyed or otherwise disposed of; and in every such suit in a court of law, the Court shall or may upon giving judgment for the plaintiff award a writ of injunction or injunctions to the defendant, commanding him to forbear from committing and not by himself or otherwise to repeat or commit any offence or wrongful act of the like nature as that of which he shall or may have been convicted by such judgment, and any disobedience of any such writ of injunction or injunctions shall be punished as a contempt of Court; and in every such

suit at law or in equity it shall be lawful for the Court or a Judge thereof to make such order as such Court or Judge shall think fit for the inspection of every or any manufacture or process carried on by the defendant, in which any such forged or counterfeit trade mark, or any such trade mark as aforesaid, shall be alleged to be used or applied as aforesaid, and of every or any chattel, article, and thing in the possession or power of the defendant, alleged to have thereon or in any way attached thereto any forged or counterfeit trade mark, or any trade mark falsely or wrongfully applied, and every or any instrument in the possession or power of the defendant, used or intended to be or capable of being used for producing or making any forged or counterfeit trade mark, or trade mark alleged to be forged or counterfeit, or for falsely or wrongfully applying any trade mark; and any person who shall refuse or neglect to obey any such order shall be guilty of a contempt of Court.

M. M Act, 1862, ss. 21, 22.

See the Introduction as to the relief of a similar nature formerly granted in Chancery.

22. In every case in which any person shall do or cause to be done any of the wrongful acts following (that is to say): shall forge or counterfeit any trade mark; or for the purpose of sale, or for the purpose of any manufacture or trade, shall apply any forged or counterfeit trade mark to any chattel or article, or to any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel,

Persons aggrieved by forgeries may recover damages against the guilty parties.

M. M. Act, 1862, s. 22.

ticket, label, or thing, in or with which any chattel or article shall be intended to be sold, or shall be sold or uttered or exposed for sale, or for any purpose of trade or manufacture; or shall inclose or place any chattel or article in, upon, under, or with any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing, to which any trade mark shall have been falsely applied, or to which any forged or counterfeit trade mark shall have been applied; or shall apply or attach to any chattel or article any case, cover, reel, wrapper, band, ticket, label, or other thing, to which any trade mark shall have been falsely applied, or to which any forged or counterfeit trade mark shall have been applied; or shall inclose, place, or attach any chattel or article in, upon, under, with, or to any cask, bottle, stopper, vessel, case, cover, reel, wrapper, band, ticket, label, or other thing, having thereon any trade mark of any other person; every person aggrieved by any such wrongful act shall be entitled to maintain an action or suit for damages in respect thereof against the person who shall be guilty of having done such act or causing or procuring the same to be done, and for preventing the repetition or continuance of the wrongful act, and the committal of any similar act.

Actions and suits by the persons aggrieved must not, when such persons are owners of trade marks and the grievance lies in the infringment of such trade marks, be instituted without considering the bearing upon this section of sec. 1 of the Act of 1875 (see p. 72).

M. M. Act, 1862, ss. 23, 24.

23. In every action which any person shall, under the provisions of this Act, commence as plaintiff for or on behalf of Her Majesty for recovering any penalty or sum of money, if the defendant shall obtain judgment, he shall be entitled to recover his costs of suit, which shall include a full indemnity for all the costs, charges, and expenses by him expended or incurred in, about, or for the purposes of the action, unless the Court or a Judge thereof shall direct that costs of the ordinary amount only shall be allowed.

Defendant obtaining a verdict to have full indemnity for costs.

As to the probable effect of the Judicature Acts and rules upon this section, see note to sec. 17, *ante*, p. 63.

A plaintiff suing for a penalty may be compelled to give security for costs.

24. In any action which any person shall, under the provisions of this Act, commence as plaintiff for or on behalf of Her Majesty for recovering any penalty or sum of money, if it shall be shown to the satisfaction of the Court, or a Judge thereof, that the person suing as plaintiff for or on behalf of Her Majesty has no ground for alleging that he has been aggrieved by the committing of the alleged offence in respect of which the penalty or sum of money is alleged to have become payable, and also that the person so suing as plaintiff is not resident within the jurisdiction of the Court, or not a person of sufficient property to be able to pay any costs which the defendant may recover in the action, the Court or Judge shall or may order that the plaintiff shall give security by the bond or recognizance of

M. M. Act, 1862, ss. 24, 25, 26.

himself and a surety, or by the deposit of a sum of money, or otherwise, as the Court or Judge shall think fit, for the payment to the defendant of any costs which he may be entitled to recover in the action.

Secs. 23 & 24 are incorporated into the Hop (Prevention of Frauds) Act, 1866, as to which see note to sec. 20, *ante*.

Act not to affect the corporation of cutlers of Hallamshire, nor to repeal 59 G. 3. c. 7.

25. Nothing in this Act contained shall be construed to affect the rights and privileges of the Corporation of Cutlers of the liberty of *Hallamshire* in the county of *York*, nor shall anything in this Act contained be construed in any way to repeal or make void any of the provision contained in the 59 Geo. 3, c. 7, intituled "An Act to regulate the Cutlery Trade in England."

As to the Cutlers' Company, see their Acts. In the last of these, 23 Vic. c. xliii, the prior Acts are scheduled.

The Act of 59 Geo. 3, c. 7 is a general Act for the regulation of the cutlery trade in England, and is chiefly directed to insure that goods marked with a hammer shall have been hammer-made; and goods marked "London" or "London made" shall have been made within the City of London, or within the distance of 20 miles therefrom.

Short title.

26. The expression "The Merchandise Marks Act, 1862," shall be a sufficient description of this Act.

TRADE MARKS REGISTRATION ACT, 1875.

(38 & 39 Vict. Chap. 91.)

ARRANGEMENT OF CLAUSES.

CLAUSE

An Act to establish a Register of Trade Marks.

[13*th August* 1875.]

Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of

T.M.R.Act, 1875.

T.M.R. Act 1875, s. 1.

the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

Registration of trade marks.

1. A register of trade marks as defined by this Act, and of the proprietors thereof, shall be established under the superintendence of the Commissioners of Patents, and from and after the 1st day of July, 1876, a person shall not be entitled to institute any proceeding to prevent the infringement of any trade mark as defined by this Act, until and unless such trade mark is registered in pursuance of this Act.

For the definition of a trade mark for the purposes of this Act, see sec. 10.

The register when open, which cannot be till three months after the first publication of the official paper (see rules 12, 13, and 16), will be kept in the Trades' Marks Registry Office, at No. 4, Quality Court, 47, Chancery Lane, W.C., where it will be open to public inspection under the regulations referred to in rule 40.

As to the method of obtaining registration, see the rules (p. 91), and the directions (p. 39).

The owners of Sheffield marks do not appear to be restrained by this section from instituting proceedings to prevent infringement, see sec. 9, clause 7, and note thereon.

It is submitted that this section will have no operation in cases founded upon the defendants having passed off goods not the plaintiff's as the plaintiff's, so long as the plaintiff can establish his case without giving his trade mark in evidence, with a view of shewing that the defendant has copied it.

In these cases, however, questions of practical difficulty will occur where the plaintiff proposes to show that the defendant has copied the plaintiff's advertisements, or

other *indicia* of his connexion with goods, not being his trade mark, and the defendant alleges that what the plaintiff affirms not to be his trade mark, is in reality his trade mark, and ought to have been registered as such. T.M.R.Act, 1875, s. 1.

A question would seem to be likely to arise under sec. 1 of the Act read in conjunction with the rules 5, 12, 16, 20, and 21 whether during the period to elapse between the sending in of the statement required by rule 5 and the receipt of the notice provided for by rule 21 a person claiming to be the owner of a trade mark will be able, on or after the 1st of July, 1876, to institute any proceeding for the prevention of the infringement of his trade mark if it corresponds with the definition in the Act. The Act says that no such proceeding shall be instituted until and unless the trade mark is registered, and in a suit so instituted, assuming a case for an injunction were made out in all other respects, it would be open to the defendant to object that the plaintiff was barred from claiming an injunction on the ground that the registration required by the first section of the Act had not been perfected. On an interlocutory application, or at the trial, if the registration were not then perfected, it is conceived that the objection would be valid and fatal to the plaintiff; but it is submitted that if the registration should be completed before the trial or before the hearing of any interlocutory application upon which it could be raised, the objection would be futile.

A somewhat similar case used to arise under the old practice in Chancery, where a plaintiff filing a bill in the character of a legal personal representative alleged in his bill the grant of probate or letters of administration. It was always held in such cases that the fact, that at the date the bill was filed the plaintiff's title had not been completed, was no objection to the suit at the hearing if the grant had then been obtained, although it might be raised by way of plea or in evidence on any interlocutory application, if at the date of the plea or of the interlocutory application there had been no grant. See

T.M.R.Act, 1875, s. 1.

Daniell's Chan. Prac. page 301, 4th edition, and the cases there cited.

It is also submitted that the principle upon which the somewhat similar case of *Leman* v. *Houseley* (L. R. 10 Q. B. 66) was decided does not apply to this Act. There it was held that an apothecary, whether registered at the commencement of the action or only at the trial, could not sue for services rendered while unregistered. It is to be observed, however, that by the 55 Geo. 3, c. 194, s. 20, the very rendering of such services is prohibited, and although the 32nd section of the 21 & 22 Vic. c. 90 would seem to point to registration at the date of trial being sufficient, yet it is clear that there is a considerable difference between having a *locus standi* and having a cause of action. One thing, however, is quite certain, that it is desirable for every owner of a trade mark to register at once, so as to avoid any such question.

As any proceedings under the Criminal Clauses of the Act, of 1862 (see p. 43) are instituted in the name of the Crown this section, whatever interpretation may be put upon it in civil matters, cannot affect such criminal proceedings

It is difficult to lay down beforehand any guide as to what proceedings will be held to be *proceedings to prevent infringement.*

It is submitted, however, that proceedings to prevent continued *i. e.* future infringements, and for relief in the nature of, and consequent upon an injunction, are the only proceedings for prevention of infringement, to obtain which registration is necessary. In support of this view it may be urged :

i. That the Act is a dis-enabling Act, and must be construed strictly, and that the grammatical meaning of "prevention" is certainly not recovery of damages in respect of that which has, ex hypothesi in an action for damages, not been prevented.

ii. That the Act of 1862, which is in *pari materiâ* has by sec. 22 (see that section, p. 67), enacted that the

person aggrieved by the wrongful acts there mentioned (forgeries of trade marks, &c.) "shall be entitled to maintain an action or suit for damages in respect thereof—*and for preventing* the repetition or continuance of the wrongful act, and the committal of any similar act." That the rights there given ought not to be taken away, except by express enactment or necessary implication and that the distinction there drawn between cure and prevention, would have been again drawn had it been intended that the Act of 1875 should deal with cure as well as prevention. T.M.R.Act, 1875, s. 1.

iii. That it would be strange if A. were allowed to take advantage of his knowledge that B. had not registered his trade mark to cheat B. with impunity so far as the civil remedy of B. was concerned.

If the strict construction contended for above is wrong, and actions for damages are within the mischief of this statute, various question may arise, to the considerations of which the following part of this note is directed.

Thus a question may arise whether the infringement of a trade mark, unregistered at the date of infringement, can be relied on as the ground of an action for damages, brought on or after the 1st of July, 1876, by a proprietor who has subsequently obtained registration. In considering this point, a distinction may be made between infringements committed before the 1st of July, 1876, and infringements committed on or after that date. There are no words in the Act expressly protecting either class of infringements, and it is submitted that as to infringements committed before the 1st of July, 1876, there is no reason why a right of action which would clearly have been enforceable in a suit commenced on the 30th of June, should not be enforced in a suit commenced on the 2nd of July. As to infringements on or after the 1st of July, 1876, and before registration, it may be argued that inasmuch as a person proposing to use a particular mark, has, by the register, a means afforded him of seeing whether there is any similar trade mark on the register,

T.M.R.Act, 1875, s. 2. and so avoiding an infringement, he has a right, after the 1st of July, 1876, to assume that if there is no such trade mark on the register there is none in use, the owner of which would object to the use of this mark by any other person. In addition, however, to the arguments above urged in support of the writer's view of the construction of this section, it is clear that in many cases, to allow such defence to prevail, would work injustice. For instance, in the case of a series of infringements extending over the whole of the current year, why should the infringer be in a better or worse position as to infringements committed in the first six month than in respect of those committed in the second six months of the year.

Characteristics of registered trade mark.

2. A trade mark must be registered as belonging to particular goods, or classes of goods; and when registered shall be assigned and transmitted only in connexion with the goodwill of the business concerned in such particular goods or classes of goods, and shall be determinable with such goodwill, but subject as aforesaid, registration of a trade mark shall be deemed to be equivalent to public use of such mark.

For the purposes of the rules, which by sec. 7 and rule 64 are to be construed as if they were part of the Act, goods are divided into 50 classes, (see rule 1 and schedule 1).

Before the 1st January, 1876, protection in the use of a trade mark could only be obtained after adducing evidence of exclusive public user prior to the infringement complained of, see Introduction p. 5, and *Lawson* v. *Bank of London*, 18 C. B. 84, extensive publication of the intention to acquire the right to the trade mark being insufficient, *Maxwell* v. *Hogg*, L. R., 2 Ch. 307. The latter part of this section renders registration, which dates

from the date of the application for registration (rule 20), equivalent to public user. Registration will thus be extremely useful in cases where it is desired to advertise, either by means of or in connection with a mark or other thing capable of being registered as a trade mark articles not yet in the market. T.M.R.Act, 1875, s. 3.

The provision of this section coupling the trade mark with the good-will of the business concerned in the goods as to which the trade mark is registered, are generally in accordance with the law prevailing before the passing of the Act. (*Hall* v. *Barrows*, 4 De G. J. & S. 150, 33 L. J. Ch. 204, 10 Jur. N.S. 55 ; *Bury* v. *Bedford*, 4 De G. J. & S. 352, 10 Jur. N. S. 503).

It is not very clear what the meaning of a trade mark being determinable with the good-will of a business may be, nor to suggest a test of a good-will being determined.

By rule 34 the Court may remove any trade mark from the registry on the ground, after the expiration of five years from the date of the registry thereof, that the registered proprietor is not engaged in any business concerned in the goods with respect to which a trade mark is registered.

There seems to be nothing in the Act or rules to prevent registration of a mark intended to be used in a business to be commenced after registration so long as a goodwill is acquired before assigning or transmitting the mark.

3. The registration of a person as first proprietor of a trade mark shall be *primâ facie* evidence of his right to the exclusive use of such trade mark, and shall, after the expiration of five years from the date of such registration, be conclusive evidence of his right to the exclusive use of such trade mark, subject to the provisions of this Act as to its connexion with the goodwill of a business. Title of first proprietor of a trade mark.

For the benefit of the lay reader, it may be remarked

T. M. R. Act, 1875, s. 3.

that the term "conclusive" applied to evidence, though somewhat inaccurate, is commonly employed as here to mean, that no other evidence would be required to support, and no evidence admitted to contradict the facts, as to which the conclusive evidence is given.

If under sec. 10, a trade mark is registered as having been in use before August 13, 1875, in which case an allegation of such user will have appeared in the statement made on application (rule 6), and in the advertisements in the official paper (rule 12), if not in the register itself (see note on the word "such" in sec. 10), it is clearly reasonable that such registration should be made *primâ facie* evidence of title in the proprietor, not only from the date of registration, but also from the 13th of August, 1875, and this may, perhaps, be held to be the effect of this section, *sed quære*? Whether under any other circumstances, and if so, to what extent a plaintiff in an action in respect of an infringement alleged to have been committed before registration, could avail himself of this section in proving the existence of his right at the date of the infringement, seems also open to question. The section certainly does not expressly enact, and it is difficult to see upon what ground, other than some supposed policy of the Act, the construction of this section could be so strained as to make the fact of A's. registration in 1876 *primâ facie* evidence of his title in 1874.

It is submitted that the term "exclusive" has reference only to the use of the trade mark in respect of the goods or classes of goods as to which it is registered.

A case might arise in which two or more persons having adverse claims to the exclusive use of the same trade mark, might be registered as proprietors thereof, either by oversight or under one of the rules numbered 17, 18, and 19. In the latter case it is submitted, that such inconsistent registrations would not be allowed except within five years from the first registration of the trade mark in question, and then only in cases in which it was deemed

necessary to give the person or persons applying for registration subsequently to the first registration of the trade mark in question, a *locus standi* to institute proceedings for the purpose of testing the right in dispute. This would only be in cases in which proceedings under sec. 5 were inapplicable. T.M.R.Act, 1875, ss. 4, 5.

Registration of separate persons as separate proprietors of one trade mark may, under rule 29, take place with the consent of all persons claiming to be entitled. As to the construction to be put upon the word "exclusive" in such cases, see note to rule 29.

Title of proprietor claiming by transmitted proprietorship.

4. Every proprietor registered in respect to a trade mark subsequently to the first registered proprietor shall, as respects his title to that trade mark, stand in the same position as if his title were a continuation of the title of the first registered proprietor.

Rectification of register.

5. If the name of any person who is not for the time being entitled to the exclusive use of a trade mark in accordance with this Act, or otherwise in accordance with law, is entered on the register of trade marks as a proprietor of such trade mark, or if the registrar refuses to enter on the register as proprietor of a trade mark, the name of any person who is for the time being entitled to the exclusive use of such trade mark in accordance with this Act, or otherwise in accordance with law, or if any mark is registered as a trade mark which is not authorised to be so registered under this Act, any person aggrieved may apply in the prescribed manner for an order of the Court that the register may be rectified;

T.M.R. Act 1875, s. 5. and the Court may either refuse such application, or it may, if satisfied of the justice of the case, make an order for the rectification of the register, and may award damages to the party aggrieved.

Where each of several persons claims to be registered as proprietor of the same trade mark, the registrar may refuse to comply with the claims of any of such persons until their rights have been determined by the Court, and the registrar may himself submit or require the claimants to submit in the prescribed manner their rights to the Court.

The Court may, in any proceeding under this section, decide any question as to whether a mark is or is not such a trade mark as is authorised to be registered under this Act, also any question relating to the right of any person who is party to such proceeding, to have his name entered on the register of trade marks, or to have the name of some other person removed from such register, also any other question that it may be necessary or expedient to decide for the rectification of the register.

The Court may direct an issue to be tried for the decision of any question of fact which may require to be decided for the purposes of this section.

Whenever any order has been made rectifying the register the Court shall by its order direct that due notice of such rectification be given to the registrar.

"The Court" is the Chancery Division of Her Majesty's High Court of Justice (r. 42, p. 113).

Applications to the Court may, subject to rules of Court under the Supreme Court of Judicature Act, 1875, be made by motion or by application in chambers, or in such other manner as the Court may direct (r. 43). T.M.R. Act, 1875, s. 6.

Provision is made by rule 44 for the case of a refusal by the registrar under the circumstances there specified, to comply with the claim of a person to have his name entered on the register as proprietor of a trade mark, and where rule 44 is in point an application under sec. 5 and rule 43 would probably be irregular.

As to the entry of rectification on the register, see r. 36.

Restrictions on registry of trade marks.

6. The registrar shall not, without the special leave of the Court, to be given in the prescribed manner, register in respect of the same goods or classes of goods a trade mark identical with one which is already registered with respect to such goods or classes of goods, and the registrar shall not register with respect to the same goods or classes of goods a trade mark so nearly resembling a trade mark already on the register with respect to such goods or classes of goods as to be calculated to deceive.

It shall not be lawful to register as part of or in combination with a trade mark any words the exclusive use of which would not, by reason of their being calculated to deceive or otherwise, be deemed entitled to protection in a Court of equity, or any scandalous designs.

As to the first part of this section, see rules 18 and 19, and notes thereon.

As to what words would not by reason of their being calculated to deceive or otherwise, have been at the date of the passing of this Act, deemed entitled to protection

T.M.R.Act, 1875, s. 7.

in a Court of equity, see *Ford* v. *Foster*, L. R. 7 Ch. 611, where the older cases are cited and explained.

The judgment of Mellish, L. J., in that case refers to the maxim *Ex turpi causâ non oritur actio* as the common principle upon which a trade mark case might fail either at law or in equity. The dictum of the same learned judge concerning the non-existence of any reported trade mark case in which the above maxim was applied at common law may account for the form of the reference in the above section (L. R. 7 Ch. at p. 630).

The circumstances under which a Court of equity would refuse protection to a trade mark which was not calculated to deceive cannot of course be enumerated, but an obvious instance would be where the trade in which the trade mark was to be employed was in itself unlawful.

It is presumed that the prohibition of this section would be deemed to apply, if the objectionable words formed the whole trade mark and not a portion only.

Establishment of registry and general rules

7. Subject as aforesaid, a register office shall be established from and after such time (not being later than the 1st day of January, 1876), in such manner and with such officers, and at such salaries, to be paid out of moneys provided by Parliament, as the Lord Chancellor may, with the consent of the Treasury, direct; and the Lord Chancellor may from time to time, with the assent of the Treasury as to fees, make, and, when made, alter, annul, or vary, such general rules as to the registry of trade marks, and as to notices to be given by advertisement before the registration of trade marks, and as to the classification of goods for the purposes of this Act, and as to the registration of first and subsequent proprietors of trade marks, and as to the fees

to be charged for registration, and also for the continuance of a trade mark on the register or otherwise, and as to the removal from the register of any trade mark, as to notices, and as to the persons entitled to inspect the register, and as to any proceedings to be taken to obtain the judgment or leave of the Court in any matter in which the judgment or leave of the Court is required to be obtained under this Act, and generally for the purpose of carrying into effect this Act, as he may deem expedient. T.M.R.Act, 1875, ss. 7, 8.

Any rules made in pursuance of this section shall be laid before both Houses of Parliament if Parliament be then sitting, or if not then sitting, then within ten days from the then next assembling of Parliament, and shall be of the same validity as if they had been enacted by Parliament; provided that if either House of Parliament resolve, within one month after such rules have been laid before such House, that any of such rules ought not to continue in force, any rule in respect of which such resolution has been passed shall, after the date of such resolution, cease to be of any force, without prejudice, nevertheless, to the making of any other rule in its place, or to anything done in pursuance of any such rules before the date of such resolution.

The rules issued under this section up to the present date will be found *post*, p. 91.

8. The certificate of the registrar as to any entry, matter, or thing which he is authorised by Certificate of registrar to be evidence.

T.M.R.Act, 1875, s s. 8, 9.

this Act, or any general rules made thereunder, to make or do, shall be evidence of such entry having been made, and of the contents thereof, and of such matters and things having been done or left undone.

See rule 41.

Under 8 & 9 Vic. c. 113, sec. 1, the certificate will prove itself.

Provision as to Cutlers' Company and Sheffield corporate marks.

9. With respect to the master, wardens, searchers, assistants, and commonalty of the Company of Cutlers, in Hallamshire, in the county of York (in this Act called "the Cutlers' Company") and the marks and devices (in this Act called, "Sheffield corporate marks") assigned or to be assigned by the master, wardens, searchers, and assistants of that company, be it enacted as follows :—

(1.) Within the prescribed time and in the prescribed manner the Cutlers' Company shall at their own expense deliver to the registrar under this Act copies of all Sheffield corporate marks in force at the time of such delivery :

(2.) When any person, after the passing of this Act, applies to the said master, wardens, searchers, and assistants to assign to him any mark or device, notice of such application, with a copy of such mark or device, shall, within the prescribed time and in the prescribed manner, be delivered to the registrar under this Act ; and such

mark or device shall not be assigned until after the expiration of the prescribed period from the giving of such notice. In like manner, when any person applies for the registration under this Act of a trade mark as belonging to any goods or class of goods specified in sec. 2 of the Cutlers' Company's Act of 1860, notice of such application, with a copy of such trade mark, shall within the prescribed time and in the prescribed manner, be delivered to the Cutlers' Company; and such trade mark shall not be registered until after the expiration of the prescribed period from the giving of the last-mentioned notice : T.M.B.Act, 1875, s. 9.

(3.) Upon the assigning of any such mark or device, or the registration of any such trade mark as aforesaid, notice of the assignment or registration shall, within the prescribed time and in the prescribed manner, be given to the registrar under this Act, or to the Cutlers' Company, as the case may be :

(4.) The registrar under this Act, without the special leave of the Court, to be given only in cases where the applicant proves his right, shall not in respect of any goods or classes of goods with respect to which a Sheffield corporate mark shall have been assigned and actually used, and of which mark a copy or description

T.M.R. Act, 1875, s. 9.

or notice of the assigning whereof shall have been delivered or given to the registrar as aforesaid, register a trade mark identical with such Sheffield corporate mark, or so nearly resembling the same as to be calculated to deceive :

(5.) The master, wardens, searchers, and assistants of the Cutlers' Company shall not assign to any person a mark or device identical with any trade mark registered under this Act, and notice of the registration whereof shall have been given to the Cutlers' Company as aforesaid, or so nearly resembling the same as to be calculated to deceive :

(6.) Any person to whom a Sheffield corporate mark legally belongs shall be entitled to have the same mark registered also as a trade mark under this Act, in respect of any particular goods or classes of goods, in the same manner, and upon the same terms and conditions in and upon which he might have registered the same if it were not a Sheffield corporate mark.

(7.) Nothing in this Act shall prejudice or affect the rights and privileges of the Cutlers' Company, nor, save as is otherwise in this Act expressly provided, shall any of the provisions of this Act apply to or in the case of any Sheffield corporate mark.

T.M.R.Act, 1875, s. 10.

(1). See rules 46, 47 and 56.

(2). As to the notice to be given to the registrar, see rules 48 and 49.

As to the period to elapse after such notice before assignment, see rule 50.

As to the converse case of an application to register under the Act, see rules 51, 52, and 53.

Sec. 2 of the Cutlers' Company's Act 1860 (23 Vic. c. xliii), refers to persons exercising the art or trade of a maker of knives, sickles, shears, scissors, razors, files, forks, saws, edge tools, or other articles of steel, or steel and iron combined having a cutting edge, or of a manufacturer of steel.

(3). See rules 54 and 55.

(7). Considering the scope of this section and the absence of any provisions which might be expected if it was intended that the owners of Sheffield marks were to be affected by sec. 2, it is submitted that the words "expressly provided" in this clause must be construed as equivalent to "provided with express reference to the Cutlers' Company, &c."

A question as to the assignability of a Sheffield corporate mark otherwise than by a surrender to the Company, and re-grant was decided in *Bury* v. *Bedford*, 4 De G. J. & S. 352, 10 Jur. N.S. 55.

As to the Cutlers' Company generally, see "The Cutlers' Company Acts," which are:—

21 James I.	c.	31,	The C. C. Act,	1623.
31 George III.	c.	58,	„	1791.
41 George III.	c.	97,	„	1801.
54 George III.	c.	119,	„	1814.
23 Vic.	c.	43,	„	1860.

10. For the purposes of this Act: Definitions.

A trade mark consists of one or more of the following essential particulars; that is to say, Trade mark.

A name of an individual or firm printed,

T.M.R. Act, 1875, s. 10.

impressed, or woven in some particular and distinctive manner; or

A written signature or copy of a written signature of an individual or firm; or

A distinctive device, mark, heading, label, or ticket;

and there may be added to any one or more of the said particulars any letters, words, or figures, or combination of letters, words or figures; also

Any special and distinctive word or words or combination of figures or letters used as a trade mark before the passing of this Act may be registered as such under this Act.

Prescribed. "Prescribed" means prescribed by general rules made in pursuance of this Act; and

Court "Court" means any of Her Majesty's superior courts of law or equity at Westminister, or any court to which the jurisdiction of such courts may be transferred, or any one or more of such courts which may be declared to be the court for the purposes of this Act by such general rules as aforesaid; but the provisions of this Act conferring a special jurisdiction on the court as above defined shall not, excepting so far as such jurisdiction extends, affect the jurisdiction of any court in Scotland or Ireland in causes, actions, suits, or proceedings relating to trades marks; and if the register requires to be rectified in consequence of any proceedings in any such court in Scotland or Ireland, due notice of such requirements

shall be given to the registrar, and he shall rectify the register accordingly. T.M.R.Act, 1875, s. 10.

In this section the word "figures" is used as equivalent to "numbers" and does not include "devices" and "marks."

The name of an individual or firm can only be registered as a trade mark when printed, impressed, or woven in some particular and distinctive manner.

This appears to be a very proper stipulation to insert. A name, may become merely equivalent to a mark and cease to denote that the article on which it appears was made by or passed through the hands of the person whose name is on the article (see *Hall* v. *Barrows* 33 L.J. Ch. 204, 4 De G. J. & S. 150) but if all names could be registered as trade marks, the use of a name for its primary purpose would be much hampered—and it might even be urged that a person who had unintentionally used name as a trade mark could be defeated on proceedings for an injunction against a fraudulent person who used the name as a trade mark, on the ground that the person whose name was used had not registered it.

There is one drawback which attaches to the use of a name as a trade mark, whether it be registered or not; namely, that if it be used by a person other than the original person described by the name, the public may be deceived. In this case, however, registration and assignment under the Act, would not, in a civil action, rebut a defence founded on the deception practised by the plaintiff, nor, in criminal cases, prevent conviction.

If an artist or artisan has acquired by his personal skill and ability, a reputation which gives to his works in the market a higher value than those of other artists or artisans he cannot give any other persons the right to affix his name or mark to the goods, because he cannot give to them a right to practise a fraud upon the public (*a*). In such cases as these it is presumed that the registrar would be justified in refusing to register a transfer.

(*a*) *Leather Cloth Company* v. *American Leather Cloth Company*, 11 H. L. Ca. at p. 545.

T. M. R. Act, 1875, s. 11.

It is submitted that where a mark has in any branch of trade become *publici juris* it is no longer a distinctive mark.

It will be observed that the permission to add any letters, words, or figures, or combination of letters, words, or figures to the essential particulars renders it possible though not perhaps expedient to register, as a trade mark something more corresponding to an advertisement than to the general notion of a trade mark. See remarks of the L.C. on this point in the *Leather Cloth Co.* v. *American Leather Cloth Co.*, 11 H.L. Ca. 523, 35 L.J. Ch. 53.

The definition of a trade mark in this section must be taken in connection with the latter part of section 6. The provision of the Act, with regard to any special or distinctive word, &c., used as a trade mark, before the passing of the Act permits the registration of a trade mark existing at the date of the Act, although it may not correspond with the definition of a trade mark adopted for the purposes of the Act. Those who have, since the passing of the Act, or may hereafter adopt trade marks not in accordance with the definition, will not be able to register such marks.

It is submitted that the word "such" in this clause, refers to the words trade mark. This clause therefore, does not provide for any distinction being made in the register between old and new trade marks, even in the case of the particular class of old trade marks here referred to; nor does it appear from any other part of the Act, nor from any of the rules, that any such distinction is necessarily to be made (see rule 20).

The "Court," has by general rule 42, for the purposes of the Act, been declared to be the Chancery Division of Her Majesty's High Court of Justice. It is perhaps unnecessary to point out, that there is nothing in the Act or rules to limit the plaintiff in an action for infringement in his selection of a *forum*.

Short title of Act.

11. This Act may be cited for all purposes as the Trade Marks Registration Act, 1875.

RULES

UNDER THE

TRADE MARKS REGISTRATION ACT, 1875.

ARRANGEMENT OF RULES.

Advertisement of Application and Notice of Opposition.

Registration of Trade Marks.

Registration of subsequent Proprietors.

Continuance of a Trade Mark on the Register.

RULES.

WHEREAS by the Trade Marks Registration Act, 1875, the Lord Chancellor is authorised from time to time, with the assent of the Treasury as to fees, to make general rules as to the registry of trade marks, and other matters connected therewith, as is in the said Act mentioned : T.M.R. Act 1875. Rules, 1–3.

Now, therefore, I, the Right Honourable Hugh MacCalmont Baron Cairns, of Garmoyle, in the county of Antrim, Lord High Chancellor of Great Britain, in pursuance of the said Act, and of all other powers enabling me in this behalf, do hereby make the following Rules :—

Preliminary.

1. For the purposes of these Rules goods are classified in the manner appearing in the first schedule hereto. Classification of goods in schedule.

See sec. 2 of the Act p. 76.
The first schedule will be found at p. 122.

2. The fees to be charged in pursuance of these rules are the fees specified in the second schedule hereto. Fees.

See page 134.

3. If any doubt arises as to what class any particular description of goods belongs to, the doubt shall be determined by the registrar. Determination of doubt as to classes.

As to wares made of mixed materials, see note at the end of schedule 1.

T.M.R. Act 1875. Rules, 4, 5. Registration of different trade marks, or trade marks in different classes.

4. A trade mark or trade marks may be registered in pursuance of the same application by the same person in respect of all or any goods, subject to the payment of the additional fees specified in the second schedule in respect of the registration of different trade marks or the extension of the same trade marks to goods in different classes.

Application for Registry.

Proceedings on application.

5. A person, whether a British subject or an alien, desiring to register a trade mark shall apply to the registrar by sending to him a statement accompanied by such declaration as is hereinafter mentioned and the prescribed fee.

"Such declaration" see rule 9.

Applications must be addressed as follows :—

The Registrar,
Trade Marks Registry Office,
Quality Court,
47, Chancery Lane, W.C.

See rule 62.

They may either be delivered by hand or sent prepaid by post, but an application will not be attended to unless it is accompanied by the proper fees specified in schedule 2 of the rules.

Fees will not be received in cash. They may be paid by a Post Office Order payable to the Registrar at the General Post Office, London ; or, if they exceed five pounds, may be paid by a cheque drawn to the "Registrar of Trade Marks or Bearer," and crossed "Bank of England."

Each application for the registry of a trade mark or marks must be accompanied by a statement, on foolscap paper, of the following particulars :—

T.M.R. Act 1875. Rule 6.

1. Name and address of applicant.
(Example.) *John Jones,*
Moon Street,
Birmingham,
Pharmaceutical Chemist.

2. Account of fees for trade mark or marks required.

(Examples.)	£	s.	d.
One trade mark in class 4 - - -	1	0	0
or			
Two trade marks in class 20 - - -	1	10	0
or			
One trade mark in four classes - -	1	6	0

The post office orders or crossed cheques enclosed for payment of fees should be fastened to the form of account of fees.

Contents of statement on application.

6. The statement shall contain the following particulars:—

A. The name and address and calling of the applicant: and

B. The description or reference to a description of the trade mark to be registered: and

C. The class or classes of goods (being some one or more of the classes mentioned in the first schedule), and the particular description or descriptions of goods in such class or classes, with respect to which he desires the trade mark to be registered: and

D. In the case of a trade mark used before the passing of this Act, a description of the goods in respect of which it has been used, and the length of time during which it has been so used.

See the forms A. and B. given in schedule 3, *post.*

T.M.R. Act 1875. Rules 7, 8.

It is submitted that the fact of particulars as to the description of goods in respect of which the trade mark is desired to be registered being required to be inserted in the statement does not take away the privilege impliedly given by sec. 2 of the Act of registering a trade mark in respect of a whole class.

One reason why an applicant has to state the fact if his trade mark was in use before the passing of the Act (13th August, 1875), is that the registrar in such cases does not have to see whether the trade mark corresponds with the usual definition of a trade mark for the purposes of the Act, but will apply a different test. See the Act, sec. 10, and note thereon, p. 90.

Requisites of statement.

7. The above statement must bear a date and be signed by the applicant. Subject to any other directions that may be given by the registrar, the statement sent to the registrar shall be upon foolscap paper of a size of thirteen inches by eight inches, and shall have on the left-hand part thereof a margin of not less than one inch and a half.

Where practicable, all the papers sent in to the registrar should be of the same size, and have the same margin.

Nature and size of representation of trade mark.

8. Subject to any other directions that may be given by the registrar, a description of a trade mark shall be given in writing, and shall be accompanied, when practicable, by a drawing or other representation in duplicate not less than three inches square, on foolscap paper of the size aforesaid, or by pasting or otherwise fastening on such paper a specimen of the trade mark.

Where a drawing or other representation or

specimen cannot be given in manner aforesaid, a specimen or copy of the trade mark may be sent, either of full size or on a reduced scale, and in such form as may be thought most convenient. T.M.R. Act 1875. Rules 8-10.

The registrar may, if dissatisfied with the representation of a trade mark, require a fresh representation either before he proceeds with the application or before he registers the trade mark.

The registrar may also, in exceptional cases, deposit in the Patent Museum a specimen or copy of a trade mark which cannot conveniently be placed on his register, and may refer thereto in his register in such manner as he thinks advisable.

9. The declaration must be on foolscap paper of the above-mentioned size, and must verify the statement, and declare that, to the best of the applicant's knowledge and belief, he is lawfully entitled to use the trade mark, and must be made and subscribed as herein-after mentioned. Declaration to accompany application.

For form of declaration, see schedule 3, form C.

As to when the registrar may dispense with a declaration, see rule 57.

As to the manner in which and persons before whom a declaration must be taken, see rule 58.

As to the seal or signature of the officer taking the declaration proving itself, see rule 59.

As to making declarations, and doing other acts on behalf of infants, lunatics, &c., see rule 60.

10. Where an application for the registry of a trade mark is made by or on behalf of a corporate or quasi corporate body of persons, the statement Application by company.

T.M.R. Act 1875. Rules 10-14.

and declaration shall be made by the secretary or other principal officer of the body of persons; and the registrar may require such proof as he thinks fit that the application made is duly authorised by such body of persons.

The registrar will probably be satisfied with proof of a resolution authorising the application by the person who applies having been passed by the governing body.

Acknowledgment of application by registrar.

11. On receipt of the application the registrar shall send to the applicant an acknowledgment thereof.

Advertisement of Application and Notice of Opposition.

Advertisement of application.

12. As soon as may be after the receipt of an application made as provided by these rules, the registrar shall require the applicant to insert an advertisement of the application in the official paper, during such time, and in such form, and generally in such manner as the registrar may think desirable, and distinguishing whether the mark has or has not been used before the 13th day of August, 1875.

Definition of official paper.

13. The official paper for the purposes of these rules shall be some paper published under the direction of the Commissioners of Patents, or such other paper as such Commissioners, or any one of them, may from time to time direct.

Means of advertising trade mark

14. For the purposes of such advertisement the applicant may be required to furnish the printer

of the official paper with a wood block or electrotype of the trade mark, of such dimensions as may from time to time be directed by the registrar or with such other information or means of advertising the trade mark as may be allowed by the registrar.

T. M. R. Act 1875. Rules 14, 15.

to be supplied to official paper.

15. A notice of opposition may be given by sending to the registrar, together with the prescribed fee, a written notice in duplicate, on foolscap paper of such size as aforesaid, stating the grounds of the opposition. The registrar shall send one copy of such notice to the applicant.

Notice and proceedings for opposition.

Within three weeks after the receipt of such notice, or such further time as the registrar may allow, the applicant may send to the registrar, on foolscap paper of such size as aforesaid, a counter-statement of the grounds on which he relies for his application, and if he does not do so shall be deemed to have withdrawn his application.

If the applicant sends such counter-statement the registrar shall require the person who gave notice of opposition to give security, in such manner and to such amount as the registrar may require, for such costs as may be awarded in respect of such opposition; and if such security is not given within fourteen days after such requirement was made, or such further time as the registrar may allow, the opposition shall be deemed to be withdrawn.

As to the manner of serving notices, &c., see rule 62.

T.M.R. Act 1875. Rules 16, 17.

As to the decision of the points raised by opposition, see rule 17 and note to rule 16.

Registration of Trade Marks.

Time of registration of trade mark.

16. On the expiration of three months from the date of the first appearance of the advertisement in the official paper, the registrar may, if he is satisfied that the applicant is entitled to registration, register the trade mark in respect of the description of goods for which he may be entitled to be registered and the applicant as the proprietor thereof, on payment of the prescribed fee.

As to the entries to be made in the register and the date of the registry, see rule 20.

It appears that where opposition has been raised to the registry of a trade mark by a person not himself claiming to be registered in respect of the same or a nearly identical trade mark, *i.e.*, in cases not coming within rule 17, that the registrar may if satisfied that the applicant is entitled to registration proceed under this section leaving the opposing party to his remedy by way of application for rectification of the register under sec. 5 of the Act (p. 79).

Duty of registrar in case of disputed claim.

17. Where each of several persons claims to be registered as proprietor of the same or a nearly identical trade mark, in respect of the same goods or goods belonging to the same class, the registrar shall use his discretion as to registering all or any of such trade marks, either unconditionally or on the condition of the introduction of such variations (if any) or otherwise as he thinks fit, or the registrar may, if in any case he thinks it

expedient, submit or require the claimants to submit their rights to the Court. T.M.R. Act 1875. Rules 17-19.

See sec. 5 of the Act (p. 79), and rule 44.

As to the possible registration under this and the two next rules of two or more persons with conflicting claims, see note to sec. 3 of the Act (p. 78).

18. Where a trade mark has been already registered in respect of any goods or description of goods belonging to one particular class, a trade mark identical with such trade mark, or so nearly resembling the same as to be calculated to deceive, shall not, without leave of the Court, be registered in the name of another person as proprietor thereof with respect to any goods in that class. Prohibition of registration of identical trade marks.

It is presumed that the leave of the Court to register a trade mark in respect of goods belonging to one class identical with a trade mark, already registered as to the same class, will be granted in all cases where the goods to which the identical trade marks are applied, though included in the same class, are so different that the identity of the marks is not likely to deceive. For instance, a purchaser of bricks marked with two crossed swords is not likely to think that they were made at Dresden, though china and bricks are both included in class 16 of schedule 1.

As to applications for leave, see rule 43.

19. Where goods may be considered as belonging to two or more classes, and the trade mark has been already registered in respect of such goods as belonging to one particular class, a trade mark identical with such trade mark, or so nearly resembling the same as to be calculated to deceive, shall not, without leave of the court, be registered in the name of another person as proprietor thereof Similar trade mark for similar goods not to be registered in two classes.

T.M.R. Act 1875. Rules 19-23.

with respect to the same or similar goods as belonging to another class.

Were it not for this rule it would be necessary, in order to protect one kind of goods, to register the trade mark applied to them in every class in which such goods could possibly be included.

Entries to be made in register.

20. Upon registering any trade mark the registrar shall enter in the register the date on which the statement relating to the application for registry was received by the registrar (which day shall be deemed to be the date of the registry) and such other particulars as he may think necessary, including the name and address of the proprietor.

The address is to be inserted for the purposes of rule 63.

If the registered proprietor has alleged user prior to August 13, 1875, will this be deemed a necessary particular?

Notice of registration.

21. The registrar shall send notice to the applicant of the registration of his trade mark.

Trust not to be entered in register.

22. There shall not be entered in the register, or be receiveable by the registrar, any notice of any trust, expressed, implied, or constructive.

See also rule 28.

Registration of subsequent Proprietors.

Registration of assignee or transmittee.

23. The person to whom any registered trade mark has been assigned or transmitted may apply to be registered as proprietor thereof.

No form of application by an assignee or transmittee is given in the 3rd schedule. It will probably be sufficient

to head the application in the same form as the other papers sent in at the same time, and after stating the name, address, and business of the applicant to refer to the accompanying papers as shewing the grounds of the application. The application should be dated and signed. **T.M.R. Act 1875. Rule 24.**

24. Where the trade mark has been assigned the person claiming as assignee to be registered shall send to the registrar, with his application, an assignment by deed executed both by the assignor and assignee, and a declaration verifying such assignment. Production of assignment, &c. by assignee.

A form of deed of assignment is given (Schedule 3, Form D.)

It is suggested that as the deed is to be executed by the assignee, some such addition as

> "I accept the above assignment, and in witness thereof, I have hereunto, &c.,"

should be adopted in order to render the form more complete, unless the deed of assignment be made in the form of an indenture. Rule 65 does not render strict adherence to the forms in schedule 3 compulsory. That rule only provides that the forms may be used, *i.e.*, that they shall be sufficient in point of form; they should not be varied in any case without due cause.

It will be observed that the form of assignment given in schedule 3 purports to assign the trade mark together with the goodwill. Rule 24 makes it necessary to assign a trade mark by deed, but it appears to be a very strict construction of section 2 of the Act to hold that the trade mark and goodwill must be assigned by one and the same deed. The point may have considerable effect upon the *ad valorem* duty. If the deed of assignment of the trade mark does not also assign the goodwill, it should refer to the goodwill so as to shew that the trade mark is assigned in connection with the goodwill.

T.M.R. Act 1875. As to the declaration verifying the assignment, see rules 27 & 57.

Rules 25, 26.

Right of transmittee or his assignee.

25. Where a trade mark has been transmitted by the death of the registered proprietor, the legal personal representative of such proprietor shall be recognised as having the title to the mark.

Where the trade mark has been transmitted by marriage, bankruptcy, or otherwise by operation of law, the person applying as the transmittee to be registered shall send to the registrar, together with his application, a statement of the manner in which such trade mark has been transmitted, and a declaration verifying such statement.

Any transmittee may assign his interest in the mark, notwithstanding that he has not been registered as proprietor thereof.

Where there are joint registered proprietors there will be no transmission until the death of the survivor, see rule 28.

As to the form of application by a transmittee, see note to rule 23.

As to the form of the declaration to be made by a transmittee, see rule 27 and schedule 3, form E.

Evidence to be produced on transmission.

26. Where the person applying to be registered claims as the transmittee of any registered proprietor, or as the assignee of a transmittee, there shall be produced to the registrar the following evidence :—

(1.) If the business concerned in the goods with respect to which the trade mark is registered is carried on in England or Ireland, then

A. If such transmission has taken place by the death of any person, there shall be produced the probate of the will of such deceased person, or the letters of administration to his estate, or an official extract therefrom; and T.M.R. Act 1875. Rule 26.

B. If such transmission has taken place by the marriage of the female proprietor, there shall be produced a certified copy of the register of such marriage, or other legal evidence of the celebration thereof, and a declaration of the identity of such female proprietor; and

C. If such transmission has taken place by the bankruptcy of the registered proprietor, or otherwise by operation of law, there shall be produced to the registrar such evidence as may, for the time being, be receivable as proof of the title of the applicant; and

(2.) Where the said business is not carried on in England or Ireland,—

There shall be produced similar evidence to that herein-before prescribed, or such evidence as would be received as sufficient evidence in the courts of justice of the country or place

T.M.R. Act 1875. Rules 26-29.

at which the proprietor carries on business.

As to the power of the registrar to dispense with any of this evidence, see rule 57.

Declaration by assignee and transmittee.

27. Every declaration made by an assignee or transmittee shall state his name and address, and that he is entitled to the goodwill of the business concerned in the goods with respect to which the trade mark is registered, or to some part of such goodwill.

For form of declaration by transmittee see schedule 3, form E.

As to the registrar's power of dispensing with a declaration, see rule 57.

Assignee, &c. of joint owners.

28. Where two or more persons are registered as joint proprietors of the same registered trade mark, those proprietors, or the survivors or survivor of them, or their or his assignee or transmittee, shall alone be recognised by the registrar as having any title to the mark.

"Or their or his assignee or transmittee" should not this be, "or their or his assignees or assignee, or the transmittee of the survivor of them?"

This rule does not of course prevent trusts or other equities attaching to the property under the control of the registered proprietors.

Registration of joint owners as separate owners of separate trade marks

29. Where divers persons claim to be severally entitled to the goodwill of a business concerned in the goods with respect to which a trade mark has been registered, such persons, or any of them, may, if they all consent thereto, and on

the production of the proper evidence, and on payment of the prescribed fee, be registered separately as separate proprietors of such trade mark. T.M.R. Act 1875. Rules 29, 30.

If all of such persons so entitled do not so consent, the registrar shall not, without leave of the court, register any of them as separate proprietors of such trade mark.

If such separate registrations take place the word "exclusive" in sec. 3 of the Act will as to each of the separate proprietors have to be read as equivalent to "exclusive against all persons except the other registered separate proprietors."

The side note, which is given as published by authority, is inaccurate.

Continuance of a Trade Mark on the Register.

30. At a time not being less than two months nor more than three months before the expiration of fourteen years from the date of the registration of a trade mark, the registrar shall send a notice to the registered proprietor that the trade mark will be removed from the register unless the proprietor pays to the registrar, before the expiration of such fourteen years (naming the date at which the same will expire), the prescribed fee, and if such fee be not previously paid, he shall at the expiration of one month from the date of the giving of the first notice send a second notice to the same effect, and if such fee be not paid before the expiration of such fourteen years the registrar may, after the end of three months from the expiration of such fourteen

Removal of trade mark after fourteen years unless fee paid.

T.M.R. Act 1875. Rules 30-34.

years, remove the mark from the register, and so from time to time at the expiration of every period of fourteen years.

Payment of additional fee after expiration of fourteen years.

31. If before the expiration of the said three months the registered proprietor pays the said fee, together with the additional prescribed fee, the registrar may, without removing such trade mark from the register, accept the said fee as if it had been paid before the expiration of the said fourteen years.

Power of commissioners to restore trade mark.

32. Where after the said three months a trade mark has been removed from the register for non-payment of the prescribed fee, the Commissioners of Patents, or one of them, may, if they are satisfied that it is just so to do, restore such trade mark to the register on payment of the prescribed additional fee and compliance with such conditions as they may think just.

Trade mark like one removed not to be registered for five years.

33. Where a trade mark has been removed from the register for non-payment of the fee or otherwise, such trade mark shall nevertheless for five years after the date of such removal be deemed for the purpose of section six of the Act, and not for any other purpose, to be a trade mark which is already registered.

Removal of trade mark where no business in goods.

34. The Court may, on the application of any person aggrieved, remove any trade mark from the register on the ground, after the expiration of five years from the date of the registry thereof,

that the registered proprietor is not engaged in any business concerned in the goods with respect to which a trade mark is registered. T.M.R. Act 1875. Rules 34-36.

See sections 2 & 3 of the Act, pages 76, 77.

Alteration and Rectification of Register.

35. The registered proprietor of any registered trade mark may, by leave of the Court, alter such trade mark, so that he do not alter any one or more of the particulars in such mark which are declared by section 10 of the Act to be the essential particulars of a trade mark, and the registrar shall, on payment of the prescribed fee and compliance with the requisitions of the registrar as to the deposit of representations of the trade mark as altered, alter the register accordingly. Alteration of non-essential parts of trade mark.

Strictly speaking an "old" trade mark, which does not contain any of the essential particulars of a trade mark under the ordinary definition in section 10, but is registered under the special provision in that section as to such "old" trade marks, could, under this rule, be entirely altered, but it is submitted that the leave of the Court would not be given to an alteration which affected the *distinctive* points in any such "old" trade mark. See note on section 10 as to such "old" trade marks.

36. Where due notice of an order of *any* Court rectifying the register has been given to the registrar, the registrar shall forthwith, upon a copy of so much of the order as relates to such rectification being left with the registrar, and payment of the prescribed fee, rectify the register in accordance with the order. Entry of rectification in register.

T.M.R. Act 1875. Rules 37-40.

37. Whenever the register is rectified or altered in any particular in respect to any trade mark, the registrar shall, if he thinks that such rectification or alteration should be made public, at the expense of any person interested publish, by advertisement or otherwise, and in such manner as he thinks just, the circumstances attending the rectification or alteration of the register.

Publication of rectification or alteration of register.

Notice to registrar of opposition in any matter.

38. Any person may send, with the prescribed fee, notice to the registrar of his desire to oppose the registration of any assignee or transmittee, or any alteration of the register. The registrar shall give to the applicant for such registration or alteration the like notice, and may require security for costs in like manner as in the case of a notice of opposition to the original registration of a trade mark.

The registrar in such case may, if he think fit, require the parties interested to submit their claims to the Court.

See rules 14 & 44.

Alteration of address, &. in register.

39. If the registered proprietor of a trade mark send to the registrar, together with the prescribed fee, notice of an alteration in his address, the registrar shall alter the register accordingly.

Inspection of Register.

Inspection and copies of register.

40. On such days and during such hours as the registrar may from time to time determine, not being less than three hours on three separate days in a week, any person may, on paying the

prescribed fee, inspect the register of trade marks; and any person may, on paying the prescribed, fee, obtain an office copy of any entry in the register. **T.M.R. Act 1875. Rules 40-44.**

41. The registrar when required for the purpose of any legal proceeding or other special purpose to give a certificate as to any entry, matter, or thing which he is authorised by this Act, or any of these rules to make or do, may, on payment of the prescribed fee, give such certificate, and shall specify on the face of it the legal proceeding or other purpose for which such certificate is granted. Certificate by registrar.

See sec. 8 of the Act.

The certificate will prove itself under 8 & 9 Vic. c. 113, s. 1.

Application to the Court.

42. The Court for the purposes of this Act is hereby declared to be the Chancery Division of Her Majesty's High Court of Justice. Definition of court.

43. An application to the Court under the Act and these rules may, subject to rules of court under the Supreme Court of Judicature Act, 1875, be made by motion or by application in chambers, or in such other manner as the Court may direct. Application to court.

44. Where the registrar refuses to comply with the claims of any persons until their rights have been determined by the Court, the manner in which the rights of such claimants may be submitted by the registrar, or, if the registrar so Submission to court of conflicting claims.

T.M.R. Act 1875. Rules 44-47.

require, by the claimants, to the Court shall, unless the Court otherwise order, be by a special case; and such special case shall be filed and proceeded with in like manner as any other special case submitted to the Court, or in such other manner as the Court may direct.

See section 5 of the Act.

It is submitted that the practice under this order as to special cases will be in accordance with the practice under 13 & 14 Vict. c. 35, which is the Act under which special cases were submitted to the Court of Chancery prior to the Judicature Acts, and which is not repealed; order 34 of schedule 1 of the last Judicature Act only being applicable in cases where a writ is issued.

Settlement of special case.

45. The special case may be agreed to by the parties, or if they differ may be settled by the registrar.

Cutlers' Company.

Time for delivery of old Sheffield marks.

46. The time within which the Cutlers' Company are in pursuance of the Act to deliver to the registrar copies of all Sheffield corporate marks in force at the time of such delivery shall be the 1st day of March 1876, or such later day as the Lord Chancellor may fix.

Manner of delivery of old Sheffield marks.

47. Subject to any other directions that may be given by the registrar the manner in which such copies are to be delivered shall be the sending to the registrar of copies *as herein-after defined* of such marks, accompanied by a statement of the names, addresses, and callings of the

persons to whom such trade marks have been assigned. T.M.R. Act 1875. Rules 47-51.

48. The time within which the Cutlers' Company are to deliver to the registrar notice of an application to them for assigning any mark or device, with a copy of such mark or device, shall be as soon as practicable after the date at which such company have determined on the mark or device to be assigned. Time for delivery of new Sheffield marks.

49. The manner in which such notice and copy shall be delivered to the registrar shall be the sending to the registrar a notice of the application, accompanied by a statement comprising the like particulars as a statement required to be made by an applicant for the registration of a trade mark by the registrar under the Act, so far as such particulars are known to the Cutlers' Company. Manner of delivery of new Sheffield marks.

50. The period before the expiration of which such mark or device shall not be assigned by the Cutlers' Company, shall be six weeks from the date of sending the said notice to the registrar. Period between notice to registrar and assignment of new Sheffield marks.

51. The time within which notice of an application for the registration under the Act of a trade mark as belonging to any particular goods or class of goods specified in section two of the Cutlers' Company's Act, 1860, together with a copy of the trade mark, is to be delivered to the Cutlers' Company, shall be as soon as practicable Time for notice of application to register new trade marks to Cutlers' Company.

T.M.R. Act 1875. Rules 51-56.

after the receipt of the application by the registrar.

As to what articles are specified in sect. 2 of the Cutlers' Company Act, see note to section 9 of the Act.

Manner of giving notice to Cutlers' Company of application.

52. The manner in which such notice is to be given shall be the sending to the Cutlers' Company a copy of the official journal containing the mark of which notice is required to be given, with a note distinguishing such mark.

Time between notice to Cutlers' Company and registration of trade mark.

53. The period from the giving of such notice, before the expiration of which the trade mark is not to be registered, shall be six weeks from the date of sending such notice to the Cutlers' Company.

Time for notice of assignment of mark or registration of mark.

54. The time within which notice of the assignment of any trade mark or device or the registration of any trade mark, is to be given to the registrar or to the Cutlers' Company (as the case may be) shall be fourteen days after such assignment or registration.

Manner of giving notice of assignment or registration of mark.

55. The manner in which such notice shall be given shall be the sending a notice of such assignment or registration, with sufficient particulars to identify the mark, or device, or trade mark, to the registrar or Cutlers' Company, as the case may be.

Description of copies for purpose of Cutlers' Company.

56. A copy of a trade mark for the purpose of these rules when sent by the Cutlers Company shall be a drawing or representation of the trade

mark, and, subject to any other directions that may be given by the registrar, shall be of a size of not less than three inches square, and shall be upon foolscap paper of such size as aforesaid. T.M.R. Act 1875. Rules 56-58.

Should not this rule run "A copy of a Sheffield mark &c." ?

Declaration and Evidence.

57. In any case in which any person is required under this Act to make a declaration on behalf of himself, or of any body corporate, or any evidence is required to be produced to the registrar, the registrar, if satisfied that from any reasonable cause such person is unable to make the declaration, or that such evidence may be dispensed with, may, upon the production of such other declaration or evidence, and subject to such terms as he may think fit, dispense with any such declaration or evidence. Dispensing with declaration, evidence, &c.

58. The declarations required by these rules shall be made and subscribed in the United Kingdom under the authority of the Act of the fifth and sixth years of the reign of King William the Fourth, chapter sixty-two, "to "repeal an Act of the present session of Par- "liament, intituled 'An Act for the more "'effectual abolition of oaths and affirmations "'taken and made in various departments of "'the State, and to substitute declarations in "'lieu thereof, and for the more entire sup- "'pression of voluntary and extra-judicial oaths "'and affidavits,' and to make other provisions "for the abolition of unnecessary oaths," and Manner in which and persons before whom declaration is to be taken.

T.M.R. Act 1875. Rules 58-60.

may be made and subscribed before any justice of the peace, or any commissioner or other officer authorised by law in any part of the United Kingdom to administer an oath for the purpose of any legal proceeding.

The declaration, when taken out of the United Kingdom, shall

(*a.*) If made in any part of Her Majesty's dominions be made and subscribed before some court, justice, or officer authorised by law in such part of Her Majesty's dominions to administer an oath for the purpose of a legal proceeding; and,

(*b.*) If made out of Her Majesty's dominions, be made and subscribed before a British consul, vice-consul, or other consular officer.

Having regard to the forms of declarations given in schedule 3, and to this rule it is submitted that the form of declaration given in the schedule to 5 & 6 Will. IV. c. 62 need not be followed, *Sed quære.*

Notice of seal of officer taking declaration to prove itself.

59. Any document purporting to have affixed, impressed, or subscribed thereto or thereon the seal or signature of any person hereby authorised to take such declaration, in testimony of such declaration having been made and subscribed before him, may be admitted by the registrar without proof of the genuineness of any such seal or signature, or of the official character of such person or his authority to take such declaration.

60. If any person is, by reason of infancy,

lunacy, or other inability, incapable of making any declaration or doing anything required or permitted by the Act or these rules to be made or done by such incapable person, then the guardian or committee, if any, of such incapable person, or if there be none, any person appointed by any Court or judge possessing jurisdiction in respect of the property of incapable persons, upon the petition of any person on behalf of such incapable person, or of any other person interested in the making such declaration or doing such thing, may make such declaration, or a declaration as nearly corresponding thereto as circumstances permit, and do such thing in the name and on behalf of such incapable person, and all acts done by such substitute shall for the purpose of the Act and these rules be as effectual as if done by the person for whom he is substituted.

T.M.R. Act 1875. Rules 60, 61. Declaration by infant, lunatic, &c.

See also Rule 57.

The side note, which is given as published by authority, is somewhat inaccurate.

Commissioners of Patents.

61. The registrar, in the exercise of his powers, duties, and discretion under the Act and these rules, shall be subject to the superintendence of the Commissioners of Patents, and shall conform in every case to any instructions, directions, orders, or rules (general or special) that may be issued, given, or made by such commissioners, or any one of them; and he shall in all cases of doubt be entitled to refer to the said commissioners, or any of them, for instructions.

Registrar subject to Commissioners of Patents.

T.M.R. Act 1875. Rules 62-65.

Notices.

Notices to be in writing and served by post.

62. Applications, statements, notices, and documents required by the Act or by these Rules to be served or sent shall be in writing or print, or partly in writing and partly in print, and may be delivered personally, or served and sent by post, and if sent by post shall be deemed to have been served and received respectively at the time when the letter containing the same would be delivered in the ordinary course of post; and in proving such service or sending it shall be sufficient to prove that the letter containing the notice was prepaid and put into the post properly addressed.

Upon sending an application, &c., by post, a memorandum should be made at the time of posting to facilitate proof of the fact.

Mode of addressing notices.

63. Any application, statement, notice, and document to be served or sent on or to the registrar shall be deemed to be properly addressed if addressed to the registrar of trade marks at his office; and if required to be served on or sent to the proprietor of any trade mark shall be deemed to be properly addressed if addressed to the registered proprietor at his registered address.

Construction of rules.

64. These rules shall be construed as if they were part of the Trade Marks Registration Act, 1875, which Act is in these Rules referred to as "the Act."

Forms

65. The forms in the third schedule to these

rules or such other forms as the registrar may direct may be used in all cases to which they are applicable. T.M.R. Act 1875. Rule 65.

CAIRNS, C.

We the Commissioners of Her Majesty's Treasury do hereby assent to the above rules so far as they relate to fees.

MAHON.

R. WINN.

Rules.
Sched. 1.

SCHEDULES.

FIRST SCHEDULE.

CLASSIFICATION OF GOODS.

	Illustrations.
	Note.—Goods are mentioned in this column by way of illustration, and not as an exhaustive list of the contents of a class.
Class 1. Chemical substances used in manufactures, photography, or philosophical research.	Such as— Acids, including vegetable acids. Alkalies. Artists' colours. Pigments. Mineral dyes.
Class 2. Chemical substances used for agricultural and horticultural purposes.	Such as— Artificial manure. Sheep washes.
Class 3. Chemical substances used in medicine and pharmacy.	Such as— Tinctures. Extracts. Barks. Patent medicines. Cod-liver oil.

Rules. Sched. 1.

Class 4.	
Raw vegetable and animal substances used in manufactures.	Such as— Resins. Oils. Dyes. Tanning substances. Fibrous substances (*e.g.* cotton, hemp, flax, jute). Wool. Silk. Cork. Seeds. Glue. Bone. Sponge.
Class 5.	
Unwrought and partly wrought metals used in manufacture.	Such as— Iron and steel, pig or cast. ,, rough. ,, bar and rail, including rails for railways. ,, bolt and rod. ,, sheets, and boiler and armour plates. ,, hoops. ,, wire.

Rules. Sched. 1.

Class 5.—*Continued.*

Unwrought and partly wrought metals used in manufacture.	Lead, pig. „ rolled. „ sheet. Copper. Zinc.

Class 6.

Machinery of all kinds, and parts of machinery, except agricultural machines and implements included in Class 7.	Such as— Steam engines. Boilers. Pneumatic machines. Hydraulic machines. Locomotives. Sewing machines. Weighing machines. Machine tools. Mining machinery. Fire engines.

Class 7.

Agricultural and horticultural implements and machines.	Such as— Ploughs. Drilling machines. Reaping machines. Thrashing machines. Drainage implements. Dairy implements. Garden implements. Cyder presses. Beehives.

Rules.
Sched. 1.

Class 8.	
Philosophical instruments, instruments and apparatus for useful purposes, or for teaching.	
Class 9.	
Musical instruments.	
Class 10.	
Horological instruments.	
Class 11.	
Surgical instruments and apparatus.	
Class 12.	
Cutlery and edge tools.	Such as— Knives. Forks. Scissors. Shears. Files. Saws. Corkscrews. Tweezers. Button-hooks.
Class 13.	
Metal goods not included in other classes.	

Rules. Sched. 1.

Class 14.	
Goods of precious metals (including aluminium, nickel, &c.), and jewellery, and imitations of such goods and jewellery.	Such as— Plate. Clock cases. Pencil cases. Sheffield and other plated goods. Gilt and ormolu work.
Class 15.	
Glass.	Such as— Window and plate glass. Painted glass. Glass mosaic. Glass for optical purposes.
Class 16.	
Porcelain and earthenware.	Such as— China. Stoneware. Terra-cotta. Statuary porcelain. Tiles. Bricks.
Class 17.	
Manufactures from mineral and other substances for building or decoration.	Such as— Cement. Plaster. Imitation marble.

Rules. Sched. 1.

Class 18.	
Engineering, architectural, and building contrivances.	Such as— Diving apparatus. Warming apparatus. Ventilating apparatus. Filtering apparatus. Lighting contrivances. Drainage contrivances. Electric bells.
Class 19.	
Arms and military stores, not included in Class 20.	Such as— Cannon. Small-arms. Fowling-pieces. Swords. Shot and other projectiles. Camp equipage. Military equipments. Military accoutrements.
Class 20.	
Explosive substances.	Such as— Gunpowder. Gun cotton. Dynamite. Fog-signals.

Rules. Sched. 1.

Class 20.—*Continued.*

Explosive substances.	Percussion caps. Fireworks. Cartridges.

Class 21.

Naval architectural contrivances and naval equipments.	Such as— Boats. Anchors. Chain cables. Windlasses. Rigging. Logs.

Class 22.

Carriages.	Such as— Railway carriages. Waggons. Railway trucks. Velocipedes.

Class 23.

Cotton yarn and thread.

Class 24.

Cotton piece goods of all kinds.

Class 25.

Cotton goods not included in Classes 23, 24, or 38.

Class 26.

Linen and hemp yarn and thread.

Class 27.

Linen and hemp piece goods.

Class 28.

Linen and hemp goods not included in classes 26 and 27.

Class 29.

Jute yarns and tissues, and other articles made of jute.

Class 30.

Silk, spun, thrown, or sewing.

Class 31.

Silk piece goods.

Class 32.

Other silk goods not included in classes 30 and 31.

Class 33.

Woollen and worsted yarns.

Rules. Sched. 1.

Class 34.	
Woollen cloths and worsted stuffs.	
Class 35.	
Woollen and worsted goods not included in classes 33 and 34.	
Class 36.	
Carpets, floor-cloth, and oil-cloth	Such as— Drugget. Mats and matting. Rugs.
Class 37.	
Leather, and skins unwrought and wrought, and hair and feathers.	Such as— Saddlery. Harness. Portmanteaus. Furs. Bristles. Haircloth. Wigs. Hair mattresses.
Class 38.	
Articles of clothing.	Such as— Hats of all kinds. Caps and bonnets. Hosiery Gloves. Boots and shoes. Other ready-made clothing.

Rules. Sched. 1.

Class 39.	
Paper (except paper hangings), stationery, printing, and book-binding.	Such as— Envelopes. Sealing wax. Pens (including steel pens). Ink. Playing cards. Blotting cases.
Class 40.	
Goods manufactured from india-rubber and gutta-percha not included in other classes.	
Class 41.	
Furniture and upholstery.	Such as— Paper hangings. Papier-maché. Mirrors. Japan goods.
Class 42.	
Substances used as food.	Such as— Cereals. Pulses. Oils. Hops. Malt. Dried fruits. Tea. Spices.

Rules. Sched. 1.

Class 42.—*Continued.*

Substances used as food.	Sago. Salt. Starch. Sugar. Preserved meats. Honey. Confectionery. Biscuits. Oil cakes, &c. Pickles. Vinegar.

Class 43.

Fermented liquors and spirits.	Such as— Beer. Cyder. Wine. Whisky. Liqueurs.

Class 44.

Mineral and aerated waters, natural and artificial.

Class 45.

Tobacco, whether manufactured or unmanufactured.

Rules.
Sched. 1.

Class 46.

Seeds for agricultural and horticultural purposes.

Class 47.

Candles, illuminating oils, matches, and common soap.

Class 48.

Perfumery (including perfumed soap).

Class 49.

Toys.
Games of all kinds.
Archery.
Fishing tackle.

Class 50.

Miscellaneous, including—

(1.) Goods manufactured from ivory, bone, wood, not included in other classes.

(2.) Goods manufactured from straw or grass, not included in other classes.

Rules. Sched. 1, 2.

Class 50.—*Continued.*

(3.) Goods manufactured from animal and vegetable substances, not included in other classes.

(4.) Tobacco pipes.

(5.) Umbrellas.

(6.) All goods not included in the foregoing classes.

GENERAL NOTE.

Any wares made of mixed materials (for example, of both cotton and silk) shall be included in such one of the classes appropriated to those materials as the registrar may decide.

SECOND SCHEDULE.

FEES.

The following fees shall be payable to the registrar on or for the following occasions or purposes :—

	£	s.	d.
1. On application to register one trade mark for one or more articles included in one class - - -	1	0	0
2. On application to register more than one trade mark for one or more articles included in one			

	£	s.	d.	Rules. Sched. 2.
class, for each additional trade mark after the first - - -	0	10	0	
3. On application to register a trade mark in respect of goods in different classes, for every class after the first to which such trade mark is extended, an additional fee of - - - -	0	2	0	
4. For registration of one trade mark	1	0	0	
5. Where the same person is registered at the same time for more than one trade mark, for registration of each additional mark after the first - - - - -	0	10	0	
6. Where the same person is registered at the same time for the same trade mark in respect of goods in different classes, for the registration of one mark in each class after the first, an additional fee of - - -	0	2	0	
7. For entering notice of opposition	2	0	0	
8. For registering subsequent proprietor - - - - -	1	0	0	
9. For altering address on the register - -	0	5	0	
10. For every entry in the register of a rectification thereof or an alteration therein, not otherwise charged - - - - -	0	10	0	
11. For continuance of mark at expiration of fourteen years - -	2	0	0	

Rules. Sched. 2, 3.

	£	s.	d.
12. Additional fee where fee is paid within three months after expiration of fourteen years -	1	0	0
13. Additional fee for restoration of trade mark when removed for non-payment of fee - -	2	0	0
14. For certificate - - - -	1	0	0
15. For inspecting register, for every quarter of an hour - - -	0	1	0
16. For office copy of documents, 2*d.* per folio, but never less than	0	1	0
17. Settling a special case by registrar	2	0	0

Note.

If a copy of a trade mark is required for any purpose, such copy shall be supplied by or at the expense of the applicant.

THIRD SCHEDULE.

FORM A.

FORM OF STATEMENT ON APPLICATION FOR REGISTRATION OF ONE TRADE MARK.

*Here insert name, address, and calling of the applicant.

†Here insert in writing description of trade mark.

I,* [*John Jones, of Moon Street, in the city of Birmingham, pharmaceutical chemist,*] apply to be registered as proprietor of a trade mark† [*being a goat's head and neck with a gold collar attached thereto*], and which is represented in the paper annexed hereto.

I desire that the said trade mark may be registered in respect of the description of goods following, contained in [*Class I., that it is to say,*‡ *acids, including vegetable acids, alkalies, artists' colours, pigments, mineral dyes*].

I have used the said trade mark in respect of the said goods for [*ten*] years before the date of this statement.§

|| The day of 187 .

(Signed) *John Jones.*¶

Rules. Sched. 3.

‡Here insert description of the goods, and the class or classes under which the applicant desires to have them registered.

§This paragraph may be omitted if the trade mark was not used before the 13th of August 1875.

||Here insert date.

¶ Here insert signature.

FORM B.

FORM OF STATEMENT ON APPLICATION FOR REGISTRATION OF MORE THAN ONE TRADE MARK.

I,* [*John Jones, of Moon Street, in the city of Birmingham, pharmaceutical chemist,*] apply to be registered as proprietor of the following trade marks, numbered from "1" to

The trade marks are described as follows; that is to say,

No. 1 is†

and is represented on paper 1 annexed hereto.

No. 2 is†

and is represented on paper 2 annexed hereto [*and so forth*].

I desire that the said trade marks may be registered in respect of the descriptions of goods following; that is to say,

* Here insert name, address, and calling of the applicant

† Here insert in writing description of trade mark.

Rules. Sched. 3.

As to No. 1, in respect of the following goods contained in class ‡

As to No. 2, in respect of the following goods contained in class ‡ [*and so forth*].

‡ Here insert description of the goods and the class or classes under which the applicant desires to have them registered.

§I have used the trade marks numbered [*respectively*] and in respect of the goods for which I desire them to be registered for years before the date of this statement.

§ This paragraph may be omitted if the trade marks were not used before the 13th of August 1875.

‖The day of 187 .

‖ Here insert date.

(Signed) *John Jones*,¶

¶ Here insert signature.

FORM C.

FORM OF DECLARATION TO ACCOMPANY STATEMENT ON APPLICATION FOR REGISTRATION OF ONE TRADE MARK.

I *A.B.* of

do hereby solemnly and sincerely declare, to the best of my knowledge and belief, as follows:—

(1.) The statement signed by me and dated the day of , and marked with the letter "A," and shown to me at the time of making this declaration is true:

(2.) The description of the trade mark in such statement is a true description of the trade mark for the registration of which I apply:

(3.) I am lawfully entitled to the use of the trade mark of which the said description is a true description. Rules. Sched. 3.

Signed *A.B.*

Declared before me

NOTE.—*The above Form will require to be altered so as to suit an application for the registration of more than one trade mark.*

FORM D.

FORM OF ASSIGNMENT OF TRADE MARK.

Trade mark, class *

Name

Place of business

*Here enter number or other means of identifying trade mark in register.

I† *A.B.* of in the county of being registered proprietor of the trade mark above particularly described, in consideration of pounds paid to me by *E.F.*, carrying on business at in the county of under the firm of *F. & Co.*, hereby assign the said trade mark to the said *E.F.*, together with the goodwill of the business concerned in the goods with respect to which the trade mark is registered.

†Alter as necessary if there be more than one proprietor.

In witness whereof I have hereunto subscribed my name and affixed my seal, this day of 18 .

(Signed)

Executed by the above-named *A.B.*,
in the presence of
[*insert description and place of residence*]

Executed by the above-named *E.F.*,
in the presence of

Rules.
Sched. 3.

Form E.

Declaration by Transmittee applying to be registered as Proprietor.

Trade mark, class , No. *.

Name of owner

Firm

Place of business

(1.) I, † the undersigned *A.B.* of in the county of , ‡ carrying on business at in the county of , declare as follows:

I declare that *A.B.*, the registered proprietor of the trade mark above described ‡ [died at in the county of , having first made his will, dated the day of whereby he appointed me executor and I proved [*or* confirmed] his said will on the day of , in the Court of], *or* [died at in the county of on the day of , intestate, and letters of administration of his estate and effects [confirmation as executor of the said

*Here enter number or other means of identifying trade mark in register.

† Alter accordingly, if more than one person makes the declaration.

‡ Alter according to circumstances.

was] on the day of duly granted to me by the Court of]:

Or,

I declare, that [the estate of] *C.D.*, the registered proprietor of the trade mark above described, was, on the day of duly § [adjudged a bankrupt] [sequestrated], and that I was on the day of appointed trustee of the [sequestrated] estate of the said *C.D.*, and I am by law entitled to be registered as proprietor of the said trade mark in place of the said *C.D.*:

§ Alter according to circumstances.

Or,

I declare, that on the day of I inter-married with, and am now the husband of *C.D.*, the registered proprietor of the trade mark above described; and * I declare that on such marriage the interest of the said *C.D.* in the said trade mark and in the goodwill of the business concerned in the goods with respect to which the trade mark is registered became by law vested in me, and that I am entitled to be registered as owner of the said trade mark in place of the said *C.D.*, and I declare that *C.D.* is the person referred to in the annexed certificate.

* Alter according to circumstances.

(2.) I am lawfully entitled to the goodwill † of the business concerned in the goods with

† If the declarant is entitled only to some share

Rules. Sched. 3.

respect to which the trade mark so transmitted to me is registered.

in the good will, the share must be specified.

And I make this solemn declaration believing the same to be true.

(Signed)

Dated at the
day of 18 .

Made and subscribed by the above-named *A.B.* in the presence of me,

(Signed)
Name of registrar [*or* justice of the peace acting in and for *or*, &c.]

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NOTE.—The following abbreviations have been employed : T. M. and t. m., for trade mark; M. M. A., for Merchandise Marks Act, 1862; and T. M. R. A., for Trade Marks Registration Act, 1875.

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